# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 06-5693**

***JOE CLARK MITCHELL, Petitioner-Appellee,***

***v.***

***JOHN REES, Warden, Respondent-Appellant.***

**Filed: January 9, 2008**

On Appeal from the United States District Court for the Middle District of Tennessee

Before: BOGGS, Chief Judge, and BATCHELDER and GIBBONS, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge.

Respondent-appellant John Rees, warden of the Corrections Corporation of America, South Central Correctional Facility, appeals the district court's grant of a writ of habeas corpus to petitioner-appellee Joe Clark Mitchell. Respondent argues that the district court erred by granting Mitchell's Rule 60(b) motion for relief from judgment because the district court relied on this court's prior decision, *Mitchell v. Rees* ("*Mitchell I*"), 114 F.3d 571 (6th Cir.1997), which was erroneously decided. For the following reasons, we reverse the decision of the district court.

I.

Mitchell was convicted in Tennessee state court in 1986. *Mitchell I,* 114 F.3d at 572-73. In April 1993, Mitchell filed a habeas petition in federal district court pursuant to 28 U.S.C. § 2254 (1994).[1] *Id.* at 575. The

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[1] At the time Mitchell filed his petition, 28 U.S.C. § 2254(d) (1994) provided:

In any proceeding instituted in a Federal court by an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

district court dismissed all of Mitchell's claims, except for a claim under *Batson v. Kentucky,* 476 U.S. 79 (1986), that African Americans had been excluded unconstitutionally from the state court jury. *Mitchell I,* 114 F.3d at 575. After a magistrate judge conducted an evidentiary hearing on the issue, the district court concluded that a *Batson* violation had occurred and conditionally granted Mitchell's petition. *Id.* On appeal, this court reversed, concluding that the district court lacked jurisdiction to conduct an evidentiary hearing because it had not identified a factor in 28 U.S.C. § 2254(d) (1994) that allowed it to dispense with the presumption of correctness for the factual findings of the state courts. *Id.* at 577-78. Excluding the facts adduced at the evidentiary hearing, and presuming the correctness of the state courts' factual findings, the court determined that Mitchell failed to establish a *Batson* violation. *Id.* at 578-79. This court found no error in the dismissal of Mitchell's other claims but remanded the case to the district court for it to determine whether Mitchell could establish ineffective assistance of counsel for failure to raise the

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And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C.A. § 2254(d) (1994).

*Batson* claim at trial or on direct appeal. *Id.* at 579 & n.13.

On remand, the district court held that the state court record demonstrated that at Mitchell's trial, his counsel had failed to make a *Batson* challenge and, as a result, the prosecutor had failed to state on the record any reason for his striking the African American. *Mitchell v. Rees* ("*Mitchell II*"), 36 F. App'x 752, 753 (6th Cir. 2002). Therefore, the district court held that "the state court record demonstrated ineffective assistance of counsel, and that ineffective assistance was cause for the failure to develop the state court record." *Id.* The district court then concluded that the evidence developed in the earlier federal court evidentiary hearing sufficed to prove the *Batson* claim, which in turn sufficed to demonstrate prejudice from trial counsel's ineffective assistance. *Id.* This court reversed, holding that the district court's conclusion was directly contrary to *Mitchell I*, and holding further that there was no basis in law for the district court's 'perfectly circular conclusion' that Mitchell's failure to develop the record in the *state post-conviction* proceedings was caused by his *trial* counsel's ineffective assistance. In *Mitchell I*, this court found that the state court's conclusion that a *Batson* violation was not established in the state court record was fairly supported by that record. *Id.* at 753-54. This court remanded the "matter with instructions to the district court to enter judgment denying the petition for a writ of habeas corpus." *Id.* at 754. The district court entered judgment in accordance with the mandate on March 14, 2002.

On September 13, 2000, this court issued its opinion in *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), in which it held that the district court has

the inherent authority to conduct an evidentiary hearing. *Id.* at 705. In doing so, the court noted that "*Mitchell*[] . . . is overbroad in that it fails to recognize the inherent authority that a district court always has in habeas cases to order evidentiary hearings . . . ." *Id.* at 706. On July 28, 2005, this court issued its opinion in *Harries v. Bell,* 417 F.3d 631 (6th Cir. 2005), in which it confirmed that "*Mitchell* conflicts with Sixth Circuit and Supreme Court precedent." *Id.* at 635. Furthermore, on June 23, 2005, the Supreme Court issued its opinion in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), in which the Supreme Court held that a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) by a habeas petitioner is not automatically treated as a successive habeas petition under 28 U.S.C. § 2244(b). *Id.* at 538.

In response to these cases, on December 9, 2005, Mitchell filed a motion for relief from judgment pursuant to Rule 60(b)(6), arguing that *Mitchell I* erroneously denied him an evidentiary hearing and requesting that the district court reopen the case and grant the hearing. The district court concluded that Mitchell's motion was not a successive habeas petition and that the decision in *Mitchell I* was in error. It also concluded that the facts of the case constituted an "extraordinary circumstance" and satisfied the requirements of Rule 60(b)(6). Therefore, it granted an evidentiary hearing, adopted the factual findings of the earlier federal court evidentiary hearing, and granted Mitchell's petition because of the *Batson* violation.

II.

As a threshold matter, respondent argues that the district court does not have the power to reconsider

its judgment under Rule 60(b) because Mitchell is challenging a judgment of this court not the district court. "Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994). "A complementary theory, the mandate rule, requires lower courts to adhere to the commands of a superior court." *Id.*; *see also United States v. Campbell,* 168 F.3d 263, 265 (6th Cir. 1999) (explaining that "the mandate rule is a specific application of the law-of-the-case doctrine"). However, these rules are not without exception. *Moored*, 38 F.3d at 1421. The Supreme Court has rejected the proposition "that an appellate court's mandate bars the trial court from later disturbing the judgment entered in accordance with the mandate." *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18, (1976); *see also Ritter v. Smith,* 811 F.2d 1398, 1401-04 (11th Cir. 1987) (cited favorably by *Gonzalez,* 545 U.S. at 534) (affirming the district court's Rule 60(b) reconsideration in a habeas case of judgment made pursuant to appellate court's mandate in light of subsequent change in controlling law). An issue already decided may be reopened in limited circumstances, such as where there is "substantially different evidence raised on subsequent trial; a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice." *Moored*, 38 F.3d at 1421 (internal quotation marks omitted). Here, the subsequent rulings by this court in *Harries* and *Abdur'Rahman* explicitly adopted a contrary view of the district court's authority to grant an evidentiary hearing from that advanced in *Mitchell I* and confirm

that *Mitchell I* was erroneous when decided. *See Harries,* 417 F.3d at 635; *Abdur'Rahman*, 226 F.3d at 705-06. Relying upon the evidence adduced from the evidentiary hearing, the district court concluded that Mitchell demonstrated a *Batson* violation, a conclusion which this court has never rejected. Given these facts, the district court was not bound by *Mitchell I.*

Still, before Mitchell's motion can be considered on its merits, Mitchell must overcome two procedural hurdles: (1) his Rule 60(b) motion must not be a second or successive *habeas* petition prohibited by AEDPA and (2) he must satisfy the requirements of Rule 60(b).[2]

A motion under Rule 60(b) may be treated as a second or successive habeas petition if necessary to enforce the requirements of 28 U.S.C. § 2244(b). *See Gonzalez*, 545 U.S. at 529, 531-32. If, under this standard, a 60(b) motion were found to be a successive habeas petition, such a finding would require application of 28 U.S.C. § 2244(b), which would serve as a jurisdictional bar to the 60(b) motion. *See, e.g.*, *Post v. Bradshaw*, 422 F.3d 419, 421 (6th Cir. 2005) (holding that the petitioner's 60(b) was barred by § 2244(b) because the motion was in fact a successive *habeas* petition). In order for § 2244(b) to be implicated, a Rule 60(b) motion must constitute a "habeas corpus application" by containing a "claim." *Gonzalez*, 545 U.S. at 530. A Rule 60(b) motion contains a claim if it asserts a federal basis for relief from a state court's judgment of conviction, *id.*,

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[2] Before the district court, Mitchell argued that the district court's equitable powers over its own judgment derived from Article III of the Constitution and 28 U.S.C. § 2243 provided bases separate from Rule 60(b) for providing relief. Mitchell does not raise these arguments on appeal.

by "seek[ing] to add a new ground for relief," or "attack[ing] the federal court's previous resolution of a claim *on the merits*," *id.* at 532. However, no claim is presented if a Rule 60(b) motion attacks "some defect in the integrity of the federal habeas proceedings," *id.*, such as "assert[ing] that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar," *id.* at 532 n.4. In short, a Rule 60(b) motion is not a successive habeas petition "if it does not assert, or reassert, claims of error in the movant's state conviction." *Id.* at 538.

Here, Mitchell's Rule 60(b) motion argues that *Mitchell I* erroneously denied him an evidentiary hearing and requests that the district court reopen the case and grant the hearing. This is not a "claim" because it does not assert an error in the state conviction and would not constitute a federal basis for relief. Respondent argues that this case is distinguishable from cases in which a limitations bar applies because here the court actually decided Mitchell's original claim on the merits. While this may be true, the focus of the inquiry is not on whether the court reached the merits of the original petition but on whether the Rule 60(b) motion contains a claim. If it does not contain a claim, it is not a habeas petition, successive or otherwise. *See Gonzalez,* 545 U.S. at 530. Because Mitchell's Rule 60(b) motion challenges only the judgment on the evidentiary hearing, it does not make a claim but rather asserts an error in the federal habeas proceeding. Therefore, Mitchell's Rule 60(b) motion is not subject to the provisions of 28 U.S.C. § 2244(b).

Although Mitchell's Rule 60(b) motion does not constitute a second or successive habeas petition, in order to prevail, he still must satisfy the requirements and limitations of Rule 60(b) to prevail. *See id.* at 534-35. Rule 60(b), in relevant part, allows a party to seek relief from a final judgment for: "(1) mistake, inadvertance, surprise, or excusable neglect . . . ; or (6) any other reason justifying relief from the operation of judgment." Fed. R. Civ. P. 60(b). A district court's decision to grant relief pursuant to Rule 60(b) is reviewed for an abuse of discretion. *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001). "A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir. 1997).

It was an abuse of discretion to grant relief under Rule 60(b)(6) because Mitchell's motion should have been brought under Rule 60(b)(1). Rule 60(b)(6) is interpreted narrowly, permitting relief only in "extraordinary circumstances." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988); *Abdur'Rahman v. Bell*, 493 F.3d 738, 741 (6th Cir. 2007). Specifically, a motion may not be brought under Rule 60(b)(6) if it is premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5). *Liljeberg*, 486 U.S. at 863 & n.11. Here, Mitchell seeks relief because *Mitchell I* was "totally wrong" and the court made a "patent error in denying an evidentiary hearing." The cases upon which he relies for this proposition confirm that the *Mitchell I* decision was an error when decided and not a correct decision abrogated by a subsequent change in the law. *See*

*Harries*, 417 F.3d at 635; *Abdur'Rahman*, 226 F.3d at 705-06. In fact, *Mitchell I* must be considered an error because the later panels of this court lacked the power to overrule the decision of the prior panel. *Compare Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel.") *with Habich v. City of Dearborn*, 331 F.3d 524, 530 n.2 (6th Cir. 2003) ("When an opinion of this court conflicts with an earlier precedent, we are bound by the earliest case."). As it is clear that Mitchell's Rule 60(b) motion alleges a mistake made by this court in *Mitchell I*, rather than a change in the law, his motion is properly made pursuant to Rule 60(b)(1). *Abdur'Rahman*, 491 F.3d at 741; *Pierce v. United Mine Workers of Am. Welfare & Ret. Fund for 1950 & 1974*, 770 F.2d 449, 451 (6th Cir. 1985) ("This Court has recognized a claim of legal error as subsumed in the category of mistake under Rule 60(b)(1)."). Therefore, the district court abused its discretion by granting relief under Rule 60(b)(6). *See McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 595-96 (6th Cir. 2002).

Construing Mitchell's motion pursuant to Rule 60(b)(1), it must be denied as untimely filed. A motion made pursuant to Rule 60(b)(1) must be made "not more than one year after the judgment, order or proceeding was entered or taken." Fed. R. Civ. P. 60(b). This time limit is jurisdictional, *Arrieta v. Battaglia*, 461 F.3d 861, 864 (7th Cir. 2006), and the district court does not have the discretion to extend the period of limitation, *Smith v. Sec'y of Health & Human Servs.*, 776 F.2d 1330, 1332-33 (6th Cir. 1985);

*see also* Fed. R. Civ. P. 6(b).[3] Mitchell argues, and the district court determined, that his motion was timely filed because, prior to the June 2005 Supreme Court decision in *Gonzalez,* relief from judgment under Rule 60(b) was treated as a successive habeas petition under *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996). While enforcement of the time limit may seem unfair, "[t]he general purpose of Rule 60(b) is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Charter Twp. of Muskegon v. City of Muskegon*, 303 F.3d 755, 760 (6th Cir. 2002) (internal quotation marks and alteration omitted). Such balancing necessarily creates situations in which an alleged injustice can no longer be remedied. The one-year deadline for seeking certain grounds of relief also "limit[s] the friction between Rule 60(b) and the successive-petition prohibitions of AEDPA." *Gonzalez*, 545 U.S. at 534-35. There is no question that Mitchell's Rule 60(b) motion was filed more than a year after the district court's judgment. Therefore, having found the motion to have been untimely filed, we reverse the decision of the district court.

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[3] Federal Rule of Civil Procedure 6(b) states in relevant part "[a court] may not extend the time for taking any action under Rule [] . . . 60(b), except to the extent and under the conditions stated in [it]."

## APPENDIX B

## UNITED STATES DISTRICT COURT
## M.D. TENNESSEE,
## COLUMBIA DIVISION.

**No. 1:93-0073.**

**JOE CLARK MITCHELL, Petitioner,**
**v.**
**JOHN REES, Warden, Respondent.**

**April 20, 2006.**

## MEMORANDUM

HAYNES, District Judge.

Before the Court is Petitioner's motion for equitable relief under Fed. R. Civ. P. 60(b)(6) (Docket Entry No. 151), seeking to set aside this Court's final judgment in this action that is predicated upon a Sixth Circuit decision, *Mitchell v. Rees*, 114 F.3d 571 (6th Cir. 1997) ("*Mitchell I*") that has been overruled by *Harries v. Bell*, 417 F.3d 631, 635 (6th Cir. 2005) and *Abdur'Rahman v. Bell*, 226 F.3d 696, 705-06 (6th Cir. 2000). Petitioner contends that absent that erroneous decision and based upon an earlier evidentiary hearing, this Court would have granted the writ for the state prosecutor's violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). In sum, Petitioner contends that extraordinary circumstances are present that seriously question the integrity of this Court's judgment that if not corrected, would result in "a judicial travesty," (Docket Entry No. 151, Motion at p. 1, quoting

*Mitchell I*, 114 F.3d at 583. (Keith, J. dissenting)). As the legal bases for his motion, Petitioner relies upon 28 U.S.C. § 2243, Fed. R. Civ. P. 60(b), *Gonzalez v. Crosby*, 545 U.S. —, 125 S.Ct. 2641 (2005), and the Court's inherent equitable authority under Article III, Section 2 of the United States Constitution.

In his response, the Respondent contends, in sum: (1) that Petitioner's motion serves as a substitute for an appeal and impermissibly challenges the Sixth Circuit's rulings; (2) that the extraordinary circumstances required by *Gonzalez* are not shown here; (3) that Petitioner could have sought relief in his subsequent appeal, *Mitchell v. Rees*, 36 Fed.Appx. 752 (6th Cir. 2002) ("*Mitchell II*"): and (4) that 28 U.S.C. § 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA") operates as a limitation on this Court's authority to grant the relief sought here. Finally, Respondent argues that *Mitchell I* is "irrelevant" in light of *Mitchell II* and cannot form a basis for relief because the basis for *Mitchell II* was procedural default, not the district court's authority to order an evidentiary hearing.

For the reasons set forth below, the Court concludes that Petitioner's Rule 60(b) motion satisfies the requirements of *Gonzalez*. The Court also concludes that special circumstances are present and failure to renew the Court's judgment would result in a miscarriage of justice in that Petitioner would be serving a life sentence based upon the verdict of a racially tainted jury.

**A. Federal Procedural History**

Joe Clark Mitchell, an African-American, was convicted by an all-white jury in Maury County, Tennessee for several offenses. During the *voir dire* of the jury, the state prosecutor struck Hattie Alderson,

an African-American juror, from the panel of prospective jurors. After exhaustion of his state court remedies, Petitioner filed this habeas action that included a claim for the state prosecutor's violation of *Batson*. The Honorable Thomas A. Higgins, district judge, dismissed Petitioner's claims except for his *Batson* claim for which Judge Higgins ordered an evidentiary hearing.

The undersigned, as the then magistrate judge, conducted the evidentiary hearing and concluded that although Petitioner made a *prima facie* showing of a *Batson* violation, Petitioner had not proved the prosecutor's reasons to be pretextual. Upon consideration of Petitioner's objections to that report and recommendation, Judge Higgins conducted a *de novo* review and after detailed findings of fact, concluded that the record established a *Batson* violation.[1] (Docket Entry Nos. 85 and 86, Memorandum and Order).

In sum, at the evidentiary hearing, District Attorney Mike Bottoms testified that he struck Ms. Alderson, because she "appeared to be an elderly lady," who would not be able to follow the evidence in the case, but he "probably" struck her because she was elderly. (Docket Entry No. 67, Evidentiary Hearing transcript pp. 14, 22, 24, 25). In Bottoms' view, "there was something about [Alderson's] appearance that bothered me." *Id.* at 35, 36. Bottoms, however, never asked any specific questions of Alderson nor did he strike white jurors who were older than Alderson including Robert Hardison, who was 11 years older than Alderson, *id.* at 38; and William Brown, who was

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[1] In addition to his stellar career as a district judge, Judge Higgins is also a Fellow of the American College of Trial Lawyers.

6 years older than Alderson *Id.* at 46. In addition, jurors Ms. John Petty and Sarah Graff, were also older than Alderson *Id.* at 40, 41. Bottoms insisted that "I know I had a good reason" for striking Alderson. *Id.* at 52.

In detailed findings, quoted *infra*, Judge Higgins, concluded, in sum: (1) that Mitchell demonstrated a *prima facie* case of race discrimination; (2) that the State proffered a race-neutral explanation for striking Alderson; but (3) that Bottoms' explanation that Alderson was struck because of her age was "not worthy of belief." (Docket Entry No. 85, Memorandum at pp. 6-9). Judge Higgins granted habeas corpus relief, subject to a new trial. (Docket Entry No. 86).

On appeal, in *Mitchell I*, the Sixth Circuit reversed and held that absent a satisfactory showing under 28 U.S.C. § 2254(d), the district court lacked the authority to order an evidentiary hearing on Petitioner's *Batson* claim. Given Mitchell's failure to demonstrate cause and prejudice for his failure to develop the evidentiary record on his *Batson* claim in the state courts, the Sixth Circuit ruled that the state court's ruling on the *Batson* claim controlled. 114 F.3d at 577-78. The Sixth Circuit affirmed dismissal of Petitioner's other claims except for his claim for ineffective assistance of counsel for failing to raise the *Batson* claim either at trial or on direct appeal. *Id.* at 579. The Sixth Circuit stated that if Mitchell could satisfy *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), on his *Batson* claim and if his *Batson* claim possessed merit, then Plaintiff could be entitled to relief on his related ineffective assistance of counsel claim. *Id.* at 579 n.13. The Sixth Circuit remanded Mitchell's *Batson* related ineffective assistance of counsel claim for failure to raise a *Batson* claim to the district court

for further proceedings, consistent with its opinion. *Id.* at 579.

Upon remand, the parties filed motions for summary judgment and those motions were referred to the undersigned, as then magistrate judge, who recommended that the writ be granted for Petitioner's trial counsel's ineffectiveness and the *Batson* violation. (Docket Entry No. 130). Judge Higgins adopted those recommendations, (Docket Entry No. 134), that Mitchell's trial counsel's was ineffective for his failure to assert a *Batson* challenge and the prosecutor's failure to state on the record any reason for his strike of the black juror established cause and prejudice to excuse any procedural default. (Docket Entry Nos. 130 and 134). See also *Mitchell II*, 36 Fed.Appx. at 753. Accordingly, Judge Higgins awarded the writ, subject to the State's retrial of the Petitioner. (Docket Entry No. 134).

In *Mitchell II* Sixth Circuit reversed and quoted the Tennessee appellate court's opinion that "'the lack of evidence on the *Batson* issue does not justify this Court in upsetting the judgment entered in the original cases.'" *Mitchell II*, 36 Fed.Appx. at 754. The Sixth Circuit deemed this language "to be a finding of fact that was 'fairly supported' by the state court record." *Id.* (citing *Mitchell I*, 114 F.3d at 578-79). The Sixth Circuit reasoned that Mitchell's counsel's cited ineffectiveness in raising the *Batson* issue at trial or appeal could not be cause for the ineffectiveness of Mitchell's state post-conviction counsel. The Sixth Circuit also noted that:

> The district court's conclusion that the state court record demonstrates ineffective assistance of counsel with regard to the *Batson* issue necessarily depends on the

> record's demonstrating the existence of a meritorious *Batson* claim. The state appellate court that reviewed the dismissal of Mitchell's post-conviction petition found that "the lack of evidence on the *Batson* issue does not justify this Court in upsetting the judgment entered in the original cases," and in *Mitchell I*, we held that to be a finding of fact that was "fairly supported" by the state court record. *Id.* at 578-79. The district court was not free to overrule our conclusion.

36 Fed.Appx. at 753-54 (footnote on ineffectiveness of counsel omitted).

Petitioner argues that *Abdur'Rahman* and *Harries* reversed *Mitchell I* and reiterated the precedents for Judge Higgins' earlier Order for an evidentiary hearing on Petitioner's *Batson* claim. In *Abdur'Rahman*, the Sixth Circuit stated:

> Mitchell's statement that a district court is without authority to order an evidentiary hearing in the absence of one of the exceptions listed in § 2254(d) is overbroad in that it fails to recognize the inherent authority that a district court always has in habeas cases to order evidentiary hearings to settle disputed issues of material fact. This court has previously recognized this principle. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) (quoting *Townsend* for the proposition that a district judge's power to receive evidence on a habeas petitioner's constitutional claim is only constrained by his sound discretion). Other Circuits have

> likewise recognized this inherent discretion. *See Seidel v. Merkle*, 146 F.3d 750, 754-55 (9th Cir. 1998); *Clemmons v. Delo*, 124 F.3d 944, 952 (8th Cir. 1997); *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993).

*Abdur'Rahman*, 226 F.3d at 706; *accord Harries*, 417 F.3d at 635 ("Warden Bell relies on this court's holding in Mitchell . . . But as we recognized in *Abdur'Rahman* . . . *Mitchell* conflicts with Sixth Circuit and Supreme Court precedent.") (citations omitted).

In these circumstances, Petitioner contends that with an evidentiary hearing, the record would establish intentional race discrimination by the state prosecutor. Petitioner's motion argues that his imprisonment for life based upon such racial discrimination presents a miscarriage of justice that the Court should remedy.

**B. Conclusions of Law**

As a threshold matter, the Court disagrees with the Respondent's contention that Petitioner's motion is a substitute for an appeal. In *Mitchell II*, the Sixth Circuit instructed the district court to enter an order of dismissal. "We REMAND this matter with instructions to the district court to enter judgment denying the petition for a writ of habeas corpus." 36 Fed.Appx. at 754 (emphasis in the original). Judge Higgins entered the Order of dismissal that was this Court's "Final Judgment". (Docket Entry No. 144). A Rule 60(b) motion addresses the district court's judgment and must be presented initially to the district court. 12 James Wm. Moore, et al., *Moore's Federal Practice* § 60.60[1] and authorities cited therein. Thus, the Respondent's Rule 60(b) motion challenges a judgment of this Court and is properly before this Court.

Petitioner asserts multiple legal bases for relief as well as a constitutional challenge to § 2244. The latter challenge is that to the extent that section bars the relief sought here, § 2244 is an unconstitutional restraint on the exercise of the Court's inherent and longstanding authority over its judgments under Article III, Section 2 of the Constitution.[2] Of

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[2] Petitioner cites Article III, Section 2 of the Constitution as granting a federal court plenary equitable power to revisit its own judgment as being within a district court's "inherent power . . . over its own judgments." *Bronson v. Schulten*, 104 U.S. (14 Otto) 410, 417 (1881). Chief Justice John Marshall stated that this authority arises where a new development "clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself" before judgment. *Marine Ins. Co. of Alexandria v. Hodgson*, 11 U.S. (7 Cranch) 332, 336 (1813). Accordingly, where the "equity of the applicant [is] free from doubt," and where a judgment "would be against conscience for the person who has obtained it to avail himself," the judgment can be revised. *Id.* at 337. A noted historical commentator observed that "one of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise." Joseph Story, Commentaries On Equity Jurisprudence As Administered In England And America, § 28, 14th ed. (Boston: Little, Brown & Co., 1918, W.H. Lyon, ed.) p. 24. As to habeas actions, "[a]ll the authorities agree that *res judicata* does not apply to applications for habeas corpus." *Darr v. Burford*, 339 U.S. 200, 214-215, 70 S.Ct. 587 (1950). "[C]ourts must be kept open to guard against injustice through judicial error." *Id.* "Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require'. Rev.Stat. § 761, superseded by 28 U.S.C. § 2243". *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (quoting *Peyton v. Rowe*, 391 U.S. 54, 66-67 (1968)). "All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus." *Storti v. Massachusetts*, 183 U.S. 138, 143 (1901). Section 2243 is substantively identical to the 1874 version of Rev. Stat. § 761

Petitioner's legal contentions, the Court addresses first the applicability of Rule 60(b) and *Gonzalez*. If these authorities are applicable and favorable to Petitioner, resolution of his constitutional challenge to Section 2244 is rendered moot. The Supreme Court has cautioned avoidance of any unnecessary decisions on constitutional issues. *See Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 300-01 (2001).

In *Gonzalez*, the Supreme Court addressed the availability of equitable relief under Fed. R. Civ. P. 60(b) in a habeas action. In essence, *Gonzalez* concluded that "Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules." 125 S.Ct. at 2646. (footnote omitted). Moreover, "AEDPA did not expressly circumscribe the operation of Rule 60(b)." *Id.* The Supreme Court recognized that a Rule 60(b) motion that is in effect a successive habeas petition does not qualify for relief under Rule 60(b).

> In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straightforwardly assert that owing to "excusable neglect," Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. *Cf. Harris v. United States*, 367 F.3d 74, 80-81 (C.A.2 2004) (petitioner's Rule 60(b) motion sought

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discussed in *Storti*. *See Wingo v. Wedding*, 418 U.S. 461, 468-469 (1974).

> relief from judgment because habeas counsel had failed to raise a Sixth Amendment claim). Similarly, a motion might seek leave to present "newly discovered evidence," Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. *E.g.*, *Rodwell v. Pepe*, 324 F.3d 66, 69 (C.A.1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. *E.g.*, *Dunlap v. Litscher*, 301 F.3d 873, 876 (C.A.7 2002). Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly. *E.g.*, *Rodwell*, *supra*, at 71-72; *Dunlap*, *supra*, at 876.
>
> We think those holdings are correct.

*Id.* at 2647.[3]

The Court also concluded that a habeas petitioner may not invoke Rule 60(b) to present a new constitutional claim for habeas corpus relief, because to do so would "circumvent[] AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 2647.

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[3] Prior to *Gonzalez*, in *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) on a Rule 60(b) motion asserting newly discovered evidence in support of a previously-denied constitutional claim, the Sixth Circuit agreed with other Circuits and held that a "Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to a cause and prejudice analysis."

*Gonzalez* limits relief under Rule 60(b) to certain circumstances: (1) where the petitioner is not challenging the denial of a constitutional "claim" "on the merits"; and/or (2) where the Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S.Ct. at 2648. Within that standard, *Gonzalez* allows a habeas petitioner to invoke Rule 60(b) to alter a district court judgment on a procedural issue that erroneously precluded a determination of the substantive merits of a petitioner's habeas claim.

> The term 'on the merits' has multiple usages. *See e.g., Semtek Int'l Inc v. Lockheed Martin Corp.*, 531 U.S. 497, 501-503 (2001). We refer here to a determination that there exist or do not exist grounds entitling a petition to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. *He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error-for example a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.*

125 S.Ct. at 2648 n.4 (emphasis added).

A qualifying Rule 60(b) motion was described in *In Re Abdur'Rahman*, 392 F.3d 174, 180 (6th Cir.

2004) (*en banc*),[4] as where the motion reflects "reason to doubt the integrity of a habeas judgment." Such a motion is proper under Rule 60(b), if the motion "attacks the manner in which the earlier habeas judgment was procured." *Id.* at 177.

The Court concludes Mitchell's motion qualifies under *Gonzalez* as a non-claim motion. First, the motion requests an evidentiary hearing that *Mitchell I* and *Mitchell II* denied him. This motion raises a procedural issue and "*merely asserts that a previous ruling which precluded a merits determination was in error.*" *Gonzalez*, 125 S.Ct. at 2648 n.4 (emphasis added). In addition, Petitioner's motion "attacks the manner in which the earlier habeas judgment was procured." *Abdur'Rahman*, 392 F.3d at 177.

Second, applying *Gonzalez*, standard in light of *Abdur'Rahman* and *Harries*, *Mitchell I*'s holding on the evidentiary hearing issue "was in error". *See Harries*, 417 F.3d at 635 ("Warden Bell relies on this court's holding in *Mitchell* . . . But as we recognized in *Abdur'Rahman* . . . *Mitchell* conflicts with Sixth Circuit and Supreme Court precedent.") (citations omitted), *accord Abdur'Rahman*, 226 F.3d at 706.

Third, applying *In re Abdur'Rahman*, this Court's final judgment, if left undisturbed, casts "reason to doubt the integrity of a habeas judgment." 392 F.3d at 180. "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the

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[4] *Abdur'Rahman* was subsequently vacated by the Supreme Court in light of *Gonzalez* and remains pending in the Sixth Circuit on remand. *See Bell v. Abdur'Rahman*, 125 S.Ct. 2991 (2005).

fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others'". *Batson*, 476 U.S. at 87-88 (quoting *Staider v. Virginia*, 100 U.S. 303, 308 (1880) with other citations omitted). Such discrimination constitutes reversible error. *Castaneda v. Partida*, 430 U.S. 482, 492 (1977).

As reflected in *Abdur'Rahman* and *Harries*, *Mitchell I* was contrary to Supreme Court precedent. *Mitchell II* relied upon *Mitchell I* and did not address the impact of *Abdur'Rahman*. This Court's current final judgment permits a life sentence based upon the verdict of a racially tainted jury and is contrary to Supreme Court and Sixth Circuit precedents. These circumstances give "reason to doubt the integrity of a habeas judgment" and justify review of that judgment of this Court.

Respondent cites the procedural default holding of *Mitchell II* that Petitioner did not demonstrate cause and prejudice to warrant an evidentiary hearing. *Keeney*, however, expressly authorizes an evidentiary hearing without a showing of cause or prejudice, where the failure to do so would result in a miscarriage of justice.[5] "We also adopt the narrow exception to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice

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[5] Under Sixth Circuit precedent, the district court is authorized to hold an evidentiary hearing to determine factual issues or if an inadequate record exists on a procedural default controversy, that was raised in *Mitchell I*. *See Alcorn v. Smith*, 781 F.2d 58, 60 (6th Cir. 1986).

would result from failure to hold a federal evidentiary hearing." *Keeney*, 504 U.S. at 11-12. Harries cited Keeney in stating that *Mitchell I* was contrary to Supreme Court precedent. 417 F.3d at 635. To uphold a life sentence tainted by racial discrimination qualifies as a miscarriage of justice under *Keeney*.

In sum, because the *Mitchell* decisions are contrary to Supreme Court precedent, this Court's final judgment is also contrary to Supreme Court precedents. Given the recent and clear availability of this Rule 60(b) option under *Gonzalez*, the only practical procedure to correct this "judicial travesty" is a Rule 60(b) motion.

*Gonzalez*, however, also requires the Rule 60(b) motion to satisfy the other conditions in its subsections, including a showing of "'extraordinary circumstances' justifying the reopening of a final judgment." 125 S.Ct. at 2649 (citations omitted). For the reasons stated earlier on the integrity of the final judgment, absent a modification of this judgment, the Court concludes that "extraordinary circumstances" for the purposes of Rule 60(b)(6) are established. Moreover, an inconsistent application of the law that deprives a party of a right accorded to other similarly situated parties presents, "extraordinary circumstances" warranting post-judgment relief, including under Rule 60(b)(6). *See e.g.*, *Gondeck v. Pan American World Airways Inc.*, 382 U.S. 25, 26-27 (1965) (granting post-judgment relief on rehearing, in the interest of justice to remedy a misinterpretation of the law); *Cincinnati Insurance Co. v. Byers*, 151 F.3d 574, 580 (6th Cir. 1998) (extraordinary circumstances based upon a post-judgment change in the law); *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985) (finding extraordinary circumstances

and granting relief from judgment based on intervening decision of Ohio Supreme Court); *Jackson v. Sok*, 65 Fed.Appx. 46, 49 (6th Cir. 2003) (per curiam) (upholding grant of Rule 60(b) motion based on intervening change in the applicable law).

To be sure, Respondent argues that *Gonzalez* states that a change in the law is not an extraordinary circumstance for Rule 60(b). On this issue, the Supreme Court stated:

> Petitioner contends that Artuz's change in the interpretation of the AEDPA statute of limitations meets this description. We do not agree. The District Court's interpretation was by all appearances correct under the Eleventh Circuits's then-prevailing interpretation of 28 U.S.C. § 2244(d)(2). *It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation. Although our constructions of federal statutes customarily apply to all cases then pending on direct review, see, e.g., Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993), *not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final.*

125 S.Ct. at 2650. (emphasis added).

This language in *Gonzalez* applies if the cited change in the law arose after Petitioner's habeas judgment became final. Based upon *Mitchell I* and *Mitchell II*, Petitioner's habeas proceeding was not final until March 4, 2002, when Judge Higgins entered the final judgment of dismissal. (Docket Entry No.

144). Thus, *Abdur'Rahman* was decided before the judgment in this action became final. Moreover, Petitioner could not have sought relief in *Mitchell II* based on *Abdur'Rahman* because Mitchell could not have filed a Rule 60(b) motion under Fed. R. Civ. P. 60(b) under *McQueen*, 99 F.3d at 1335. *In Re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004)(en banc) overruled *McQueen*, but that decision never became final, because the Sixth Circuit stayed the mandate on January 6, 2005. See No. 3:96cv0380, Docket Entry No. 307 (M.D. Tenn. Order entered January 11, 2005). The Supreme Court subsequently vacated and remanded *Abdur'Rahman* for reconsideration in light of *Gonzalez*. *See Bell v. Abdur'Rahman*, 545 U.S. —, 125 S.Ct. 2991 (2005). It was not until the Supreme Court's June 2005 decision in *Gonzalez* that *McQueen* was effectively overruled to allow Mitchell to file his present motion. Mitchell has promptly sought relief in light of the circumstances and in light of *Gonzalez*.

As to Respondent's other arguments to preclude relief on this motion, Respondent asserts that Petitioner could have sought this relief based upon *Abdur'Rahman* during his appeal in *Mitchell II*. The district court's Order giving rise to *Mitchell II* was entered on May 12, 1999. *Abdur'Rahman* was decided on September 13, 2000. By that time, Petitioner was before the Sixth Circuit and could not advance a theory on appeal that was not presented to the district court. *Logan v. Denny's Inc.*, 259 F.3d 558, 570 (6th Cir. 2001); *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243-45 (6th Cir. 1991). Although an exception to this rule exists, the exception is limited to a "purely legal issue." *Logan*, 259 F.3d at 570 n.6. Petitioner's motion raises a combination of factual and legal issues. As discussed earlier, any Rule 60(b)

motion had to be presented first to the district court and given the appeal in *Mitchell II*, the district court was without jurisdiction to act. Petitioner could not have sought relief from judgment under Fed. R. Civ. P. 60(b) until the Supreme Court's June 2005 decision in *Gonzalez*, by which *McQueen* was effectively overruled.

Respondent next contends that *Mitchell I* is "irrelevant" and cannot form a basis for relief because *Mitchell II* was decided on procedural default grounds. *Mitchell II*, however, discussed *Mitchell I* and the district court's reliance upon the earlier hearing transcript discussed in *Mitchell I*, 36 Fed.Appx. at 753. *Mitchell II* cited *Mitchell I* as the basis for its reversal of the district court on Petitioner's *Batson* claim. As the Sixth Circuit stated:

> The district court's conclusion that the state court record demonstrates ineffective assistance of counsel with regard to the *Batson* issue necessarily depends on the record's demonstrating the existence of a meritorious *Batson* claim. The state appellate court that reviewed the dismissal of Mitchell's post-conviction petition found that "the lack of evidence on the *Batson* issue does not justify this Court in upsetting the judgment entered in the original cases," and in *Mitchell I*, we held that to be a finding of fact that was "fairly supported" by the state court record. *Id.* at 578-79. The district court was not free to overrule our conclusion.

36 Fed.Appx. at 753-54 (footnote on ineffectiveness of counsel omitted). *Mitchell I* and *Mitchell II* are both predicated on the holding that the district court's order

to conduct the evidentiary hearing was error. This contention is without merit.

Thus, the Court concludes the Mitchell's Rule 60(b) motion qualifies under *Gonzalez* and satisfies the other requirements of Rule 60(b)(6). The next issue is whether to grant the evidentiary hearing.

This Court can order an evidentiary hearing if "a fundamental miscarriage of justice would result from failure to hold an evidentiary hearing." *Keeney*, 504 U.S. at 11-12. For the reasons stated earlier, the circumstances of this action represent a miscarriage of justice. To remedy that miscarriage of justice requires the consideration of the transcript of the evidentiary hearing ordered by Judge Higgins. Neither party cites the need for any further proceeding beyond the consideration of the transcript of that hearing.

After a review of that record, the Court adopts the factual findings and the conclusions of law of Judge Higgins as this Court's ruling on the merits of the Petitioner's *Batson* claim.

> The evidence before the Court indicates that the respondent's explanation for the peremptory challenge of the black jurors,[5] Ms. Alderson, is pretextual and the petitioner has carried his burden of proving purposeful discrimination. During the evidentiary hearing, the prosecutor, Mr. Bottoms, testified that he struck Ms. Alderson because of her elderly appearance, as he believed that she would be unable to follow the evidence in the case.[6] Transcript of evidentiary hearing (filed June 1, 1995; Docket Entry No. 67) at 22. He further testified that the reason he challenged Ms. Alderson was "probably"

because she was elderly. *Id.* at 24-25. Because a discriminatory intent is not inherent in this explanation, the respondent's reason is deemed to be racially neutral. *See Hernandez*, 500 U.S. at 36.

> n.5 The only other black juror was excused by the trial court for cause after Ms. Alderson was peremptorily struck by the respondent.
>
> n.6 Mr. Bottoms explained that the State's case consisted of circumstantial evidence. Transcript of evidentiary hearing (filed June 1, 1995; Docket Entry No. 67) at 22.

However, the evidence before the Court leads to the conclusion that this racially neutral explanation, however characterized, is not worthy of belief. As an initial matter, it is undisputed that Mr. Bottoms failed to strike white jurors who were older than Ms. Alderson. Although the evidence indicates that Mr. Bottoms was unaware of the jurors' specific ages, the Court notes that a number of the white jurors who were not challenged by Mr. Bottoms were older than Ms. Alderson, one of whom was eleven years older. *See* transcript at 38-41.

Furthermore, Mr. Bottoms did not identify any objective criteria upon which to base his conclusion that Ms. Alderson was unable to follow the evidence because of her elderly appearance. Specifically, he did not indicate that she looked

particularly frail or infirm in any way which might signify a physical condition which would render her less able to follow the course of the trial. Rather, Mr. Bottoms acknowledged that he could not specify what aspect of Ms. Alderson's appearance led him to conclude that she would be unable to follow the evidence. *Id.* at 35-36. Likewise, he admitted that he could not recall anything about her demeanor.[7] *Id.* at 51.

> n.7 Unfortunately, Mr. Bottoms was unable to locate his file containing his trial notes on his reasons for striking Ms. Alderson.

Mr. Bottoms' questions during voir dire examination support an inference of discriminatory purpose. *See Batson*, 476 U.S. at 97. For example, it is significant that Mr. Bottoms asked Ms. Alderson no questions individually, relying solely upon her responses to questions directed to a group of three jurors which included Ms. Alderson. Transcript at 32-34. Mr. Bottoms acknowledged that the only question Ms. Alderson answered differently from the other two jurors was with regard to her experience of serving on many juries.[8] *Id.* at 46, 51. Nonetheless, a white juror in this group, Ms. Stephens, who was slightly over one year younger than Ms. Alderson, was not challenged by Mr. Bottoms.[9] *Id.* at 43.

> n.8 The Court notes that Ms. Alderson's extensive previous jury service might be considered to be a

variable which would enhance her ability to understand and follow court proceedings.

n.9 Although not challenged by the state, Ms. Stephens was apparently struck by the defendant.

Furthermore, Mr. Bottoms failed to ask Ms. Alderson any questions concerning her health, physical condition, mental state or general ability to follow the court proceedings. Although Mr. Bottoms did not know Ms. Alderson's age and claimed to have concerns due to her elderly appearance, he failed to ask her any questions to elicit her age or other information relevant to his concerns. He did not ask any questions to determine whether her age, physical condition or health would have an impact on her ability to serve as a juror.

Moreover, the conclusion that the respondent's proffered neutral explanation is pretextual is further supported by Mr. Bottoms' reliance on general assertions and his failure to recall precisely why he concluded Ms. Alderson would be unable to follow the evidence. It is curious that Mr. Bottoms' trial notes documenting his reasons for striking Ms. Alderson are nowhere to be found,[10] although other parts of the trial file were located. In addition, Mr. Bottoms testified that two other prosecutors tried the case and participated in the voir dire and that all three prosecutors agreed on the peremptory

> strikes. *Id.* at 21. Despite this fact, the respondent failed to call the other two prosecutors with whom Mr. Bottoms consulted during the trial in an effort to overcome the absence of documentation and Mr. Bottoms' failure to recall.
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> > n.10 The Court finds it passing strange that Mr. Bottoms' notes concerning Ms. Alderson were not turned over to the attorney general's office along with the rest of his documentation of this trial.
>
> Finally, Mr. Bottoms' testimony that he knew he had a good reason for striking Ms. Alderson or he would not have done so because he does not challenge jurors for race is clearly insufficient. As noted by the Supreme Court, a prosecutor may not rebut the defendant's case "merely by denying that he had a discriminatory motive or 'affirm[ing][his] good faith in making individual selections.'" *Batson*, 476 U.S. at 98 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

(Docket Entry No. 85, Memorandum at pp. 6-9).

For the above-stated reasons, the Court concludes that the Petitioner is entitled to relief from this Court's prior final judgment in this action (Docket Entry No. 144) and to the writ of habeas corpus.

An appropriate Order is filed herewith.

**ENTERED** this the 20th day of April, 2006.

WILLIAM J. HAYNES, JR.
United States District Judge

# APPENDIX C

## UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

**No. 99-5838**

***JOE CLARK MITCHELL, Petitioner-Appellee,***

***v.***

***JOHN REES, Warden, Respondent-Appellant.***

**Filed: January 28, 2002**

On Appeal from the United States District Court for the Middle District of Tennessee

Before: KRUPANSKY, BOGGS, and BATCHELDER, Circuit Judges.

BATCHELDER, Circuit Judge.

Respondent-Warden John Rees brings this appeal from the order of the district court granting Petitioner Mitchell's petition for a writ of habeas corpus. This is the second time this case has been before us. We now reverse the judgment of the district court.

In *Mitchell v. Rees* ( "*Mitchell I*"),[1] 114 F.3d 571 (6th Cir.1997), we held that the district court had erred in holding an evidentiary hearing on Mitchell's

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[1] The facts underlying this appeal are fully set out in our first opinion, and we will not repeat them here.

*Batson*[2] claim without requiring Mitchell to demonstrate cause and prejudice for his failure to develop the evidentiary record on that claim in the state court, and that the district court had erred in granting the petition for the writ on the basis of the *Batson* claim. We further held that Mitchell's claims of insufficiency of the evidence and-with one explicit exception-ineffective assistance of counsel had been properly dismissed by the district court. That explicit exception was Mitchell's claim that his counsel had been ineffective in failing to raise a *Batson* claim either at trial or on direct appeal. This ineffective assistance claim had been raised for the first time in Mitchell's appeal of his state court post-conviction petition. Noting that if Mitchell "were able to demonstrate that he was entitled under Keeney [v. Tamayo-Reyes, 504 U.S. 1 (1992)] to an evidentiary hearing on his *Batson* claim, and if he were then able to demonstrate that that claim had merit (an issue which we do not reach in this appeal), then he might also be able to prevail on this related ineffective assistance claim," *Mitchell I*, 114 F.3d at 579 n. 13, we remanded the ineffective assistance claim to the district court for further proceedings. *Id.*

On remand, Mitchell moved for summary judgment and argued that his counsel's failure to make a *Batson* objection at trial excused Mitchell's later failure in state court post-conviction proceedings to put on evidence that a *Batson* violation had occurred at trial. The threshold issue before the district court on remand was whether Mitchell had shown cause and prejudice regarding his failure to raise and support his *Batson* claim in the state court

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[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

post-conviction proceeding.[3] The district court held that the state court record demonstrated that at Mitchell's trial, his counsel had failed to make a *Batson* challenge and the prosecutor had failed to state on the record any reason for his strike of the black juror. Hence, the district court held, the state court record demonstrated ineffective assistance of counsel, and that ineffective assistance was cause for the failure to develop the state court record. The district court then concluded that the evidence developed in the earlier federal court evidentiary hearing sufficed to prove the *Batson* claim, which in turn sufficed to demonstrate prejudice from trial counsel's ineffective assistance.

The Warden protests that the district court's holding that the state court record demonstrates the ineffective assistance of Mitchell's trial counsel is directly contrary to this court's opinion in *Mitchell I.* We agree. The district court's conclusion that the state court record demonstrates ineffective assistance of counsel with regard to the *Batson* issue necessarily depends on the record's demonstrating the existence of a meritorious *Batson* claim.[4] The state appellate court

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[3] As we pointed out in *Mitchell I*, and contrary to the finding of the district court on remand, it is clear from the record in the state court proceedings that Mitchell did not raise in his state court post-conviction petition either a *Batson* claim or a claim of ineffective assistance related to *Batson*. At the hearing on that petition, however, he was permitted, over the objection of the State, to present evidence with regard to the *Batson* claim. The state court found no merit to any of his claims and dismissed the petition. On appeal, Mitchell explicitly raised both a *Batson* claim and a *Batson*-related ineffective assistance of counsel claim.

[4] For counsel's performance to have been constitutionally ineffective, it must not only have been so deficient that it was tantamount to no counsel at all, but the deficiency must have

that reviewed the dismissal of Mitchell's post-conviction petition found that "the lack of evidence on the *Batson* issue does not justify this Court in upsetting the judgment entered in the original cases," and in *Mitchell I*, we held that to be a finding of fact that was "fairly supported" by the state court record. *Id.* at 578-79. The district court was not free to overrule our conclusion.

The Warden also protests that the failure of Mitchell's counsel to raise a *Batson* challenge at trial cannot be cause for Mitchell's failure to raise or support his *Batson* claim in the post-conviction proceedings. We agree. The threshold showing Mitchell was required to make in the proceedings on remand was that he had cause for his failure to develop that state post-conviction record. Even if we were to assume that Mitchell's trial counsel was constitutionally ineffective for failing to raise a *Batson* claim at trial, we hold that there is no legal basis for the district court's perfectly circular conclusion that the ineffective assistance of counsel during the trial was the cause for Mitchell's failure to develop the record in the post-conviction proceedings.

For the foregoing reasons, we REVERSE the judgment of the district court. We REMAND this matter with instructions to the district court to enter judgment denying the petition for a writ of habeas corpus.

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been prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984). Manifestly the failure to raise a meritless Batson challenge could not have prejudiced the defense.

## APPENDIX D

## IN THE UNITED STATES DISTRICT

## MIDDLE DISTRICT OF TENNESSEE

## COLUMBIA DIVISION

**No. 1:93-0073**
**Judge Higgins**

***JOE CLARK MITCHELL, Petitioner,***

***v.***

***JOHN REES, Warden, Respondent.***

**FILED: JANUARY 15, 1999**

## REPORT AND RECOMMENDATION

### I. INTRODUCTION

This petition was referred to the Magistrate Judge by the Honorable Thomas A. Higgins, District Judge, by Order entered December 16, 1998 (Docket Entry No. 129). Pursuant to 28 U.S.C. § 636(b) and Rule 8(b)(1), Rules Governing Section 2254 Cases, the Magistrate Judge was directed to submit proposed findings of fact and conclusion of law on the petitioner's motion for summary judgment (Docket Entry No. 114).

Petitioner, Joe Clark Mitchell ("Mitchell"), a state prisoner, filed this action under 28 U.S.C. § 2241, *et. seq.*, seeking a writ of habeas corpus to set aside his convictions for aggravated assault, armed robbery,

aggravated kidnapping, arson, first degree burglary, aggravated rape, and simple rape (Docket Entry No. 1). In his petition, Mitchell presented nine claims, including insufficient evidence to support each of his convictions; two sentencing issues; a claim of prosecutorial misconduct; denial of his right to a speedy trial; ineffective assistance of counsel; and the prosecution's use of its peremptory challenges to exclude blacks from his jury. The Court earlier dismissed all of petitioner's claims, except his *Batson*[1] claim on the striking of black jury panel members (Docket Entry Nos. 13 and 14). Petitioner's motion to reconsider that Order was denied (Docket Entry No. 21, September 14, 1993).

The Court then referred the *Batson* claim to the Magistrate Judge for a hearing to determine the merits of that claim (Docket Entry No. 14). The Federal Public Defender was appointed to represent the petitioner, and conferences were held December 6, 1993 and November 21, 1994 to prepare for the hearing (Docket Entry Nos. 32 and 54). An evidentiary hearing on petitioner's *Batson* claim was held on December 12, 1994 (Docket Entry No. 67). After the hearng, the parties submitted memoranda addressing the *Batson* issue (Docket Entry Nos. 59 and 60). Each party then filed a reply (Docket Entry Nos. 61 and 62).

In an earlier report and recommendation, the Magistrate Judge concluded that the petition should be denied (Docket Entry No. 64). While Mitchell has made a *prima facie* showing of a *Batson* violation, *id.* at pp. 11-12, the respondent has presented a neutral explanation for the prosecutor's striking of one black juror from the jury panel. *Id.* at pp 16-18. With this

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

response, Mitchell has not presented proof to show that this neutral explanation is pretextual for racial discrimination. *Id.* The Court, however, rejected that report and recommendation, concluding that the petitioner had carried his initial burden of proof and that the prosecutor's explanation was insufficient to provide a neutral explanation and in fact reflected a discriminatory purpose in striking the lone black juror from the jury panel in a case involving an interracial crime (Docket Entry No. 85, Memorandum at pp. 7-9).

On appeal, the Sixth Circuit reversed, concluding that the Court exceeded its jurisdiction in holding an evidentiary hearing because the Court did not require the petitioner to overcome statutory presumption of correctness of the state courts' finding on the *Batson* claim. *Mitchell v. Rees*, 114 F.3d 571, 577, 579 (6th Cir. 1997). The Court found that the petitioner failed to develop adequately the state court record on his *Batson* claim in a post-conviction proceeding and had not established the cause for such inadequacy or prejudice due to such inadequacy. Yet, the Sixth Circuit remanded the petitioner to this Court, noting that

> We except from this holding the claim of ineffective assistance of counsel for failure to raise the Batson claim at trial or on direct appeal. If petitioner were able to demonstrate that he was entitled under [*Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)] to an evidentiary hearing on his *Batson* claim and if he were able to demonstrate that that claim had merit (as issue we do not reach in this appeal), then he might also be able to prevail on this related ineffective assistance of counsel

> claim. We therefore hold that the judgment of the district court dismissing this claim is vacated, and the matter is remanded to the district court for further proceedings not inconsistent with this opinion.

114 F.3d at 579, n.13.

In his pending motion for summary judgment, the petitioner is presenting the precise issues and claims cited in the Sixth Circuit's cited footnote, i.e. (1) that the evidence in the state court record establishes cause and prejudice to warrant an evidentiary hearing; (2) that the evidence in the state court record and from the earlier evidentiary hearing in this court establishes a *Batson* violation; and (3) that his trial counsel was ineffective in failing to raise the *Batson* issue at trial (Docket Entry No. 115). Thus, the petitioner should be granted the writ.

In response, the respondent contends that as a matter of law, in a post-conviction proceeding, there is no right to counsel and as such, petitioner cannot establish cause or prejudice for his counsel's failure to develop the record on the *Batson* issue in the state post-conviction proceeding. In a word from the state's perspective, any procedural default by counsel occurred during the state post-conviction petition (Docket Entry No. 123, Respondent's Memorandum at pp. 2-3.

For the reasons set forth below, the Magistrate Judge concludes first that Mitchell has established cause and prejudice for his failure to develop the state record on his *Batson* claim that was due to the ineffectiveness of his trial counsel. With this showing, the Magistrate Judge concludes that the Court can consider the evidence at the earlier evidentiary proceeding in this action. Upon consideration of the

state record and the facts at the evidentiary hearing in this Court, the Magistrate Judge adopts the findings of fact and conclusions of the Court that the prosecution's peremptory strike of a black juror was racially motivated and such act resulted in a *Batson* violation and an unfair trial.

Based upon the state record alone, the Magistrate Judge also concludes that petitioner's trial counsel provided ineffective assistance for his failure to challenge timely the prosecution's racially motivated peremptory juror strike and to develop a full record of that act. The state court record reflects that petitioner's trial counsel was clearly aware of a *Batson* violation by the prosecutor, but petitioner's trial counsel failed to object or to pursue any proof of that violation. Petitioner was prejudiced by his trial counsel's omission in that he deprived a petitioner of a just result on direct appeal and denied a juror who was a member of his peers to whom he is constitutionally entitled to have served on his jury. This juror was stricken due to the prosecutor's racial bias. The prosecutor's act also stigmatized this member of the jury panel and compromised the integrity of the proceeding that is a separate component of the *Batson* holding.

II. REVIEW OF STATE COURT PROCEEDINGS

On September 25, 1986, a jury in Maury County found Mitchell guilty of aggravated assault, armed robbery, aggravated kidnaping, arson, first degree burglary, and aggravated rape (Docket Entry No. 7 at Addendum No. 4 at p. 1, filed June 14, 1993). Mitchell is black and the victims were white women. The essential facts of Mitchell's conviction were summarized by the Tennessee Court of Criminal Appeals as follows:

> All of the defendant's convictions arose out of a single crime spree during which two women, one quite elderly, were terrorized for several hours. One of the victims testified that as she was leaving her friend's house, a man started towards her across the lawn. He hit her several times with a large stick and he was armed with a gun and a hunting knife. He forced both women into the house, used duct tape to tape their ankles, arms, mouths, and eyes. He stole their jewelry and ransacked the house. He used a knife to cut the clothes off the testifying witness and raped her. Then he set fire to the house. He carried both women to a car, drove around for several hours, stopping at one point to rape the witness one more time. He eventually abandoned the car and the women, and they were able to free themselves and walk for help.

*Id.* at 2.

The Tennessee Court of Criminal Appeals reduced one of Mitchell's aggravated rape convictions to simple rape. *Id.* at 8. The life sentence imposed for this crime was modified to a consecutive thirteen-year term. *Id.* Mitchell did not raise any *Batson* issue on direct appeal. The Tennessee Supreme Court denied petitioner's application for discretionary review. *Id.* at Addendum No. 6, Order filed June 14, 1993).

Mitchell then filed a petition for post-conviction relief in the Circuit Court of Maury County. *Id.* at Addendum No. 2 at 3, filed June 14, 1993. In that proceeding, Mitchell presented his *Batson* claim for the first time and also challenged his trial counsel's

effectiveness for, among other things, ineffectiveness in the selection of the petit jury that was tainted with racial prejudice. *Id.* at Addendum No. 2, Transcript of Post-Conviction Relief Hearing at 6, and Addendum No. 7, filed June 14, 1993. After the appointment of counsel and an evidentiary hearing, the trial court dismissed the petition. *Id.* at 115-123. The trial court found that Mitchell had effective assistance of counsel at trial, but did not make any express findings on Mitchell's *Batson* claim. *Id.*

On appeal, the Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief (Addendum No. 10 at 2, filed June 14, 1993). The Court of Criminal Appeals summarized the relevant testimony at the post-conviction hearing on Mitchell's *Batson* claim, as well as his ineffective assistance of trail counsel claim, as follows:

> The only evidence was the testimony of the appellant and the trial attorney who represented him in the convicting trial.
>
> We can readily see why the trial judge ruled counsel was competent. The testimony shows trial counsel was well prepared int his case and gave sound advice to the appellant. The appellant's testimony reflects diminished credibility on his part. The record supports the finding of the trial judge on the question of competence.
>
> * * *
>
> The appellant testified there were blacks among the venire summoned as prospective jurors for his trial. He further testified the district attorney general used peremptory challenges to remove those called for in his

> case. He further testified no black juror sat on his case.
>
> Trial counsel testified there were blacks in the venire. He was less definite on whether blacks were on this particular panel. The attorney testified he probably told this appellant, as testified to by the appellant, that the state was excusing black jurors.
>
> The record does not show how many peremptory challenges were used by the state or whether the district attorney general exercised peremptory challenges to excuse those who were not a member of the minority class involved in this complaint; nor does the record show whether there were other black persons left on the venire who might have been called to serve in this case.

*Id.* at pp. 1-2 (emphasis added). The Court then concluded that "the lack of evidence on the *Batson* issue" did not justify upsetting the judgment entered in the original cases. *Id.* The Tennessee Supreme Court once again denied Mitchell's application for review of his convictions *Id.* at Addendum No. 12, Order filed June 14, 1993.

As noted earlier, the state court record reflects that the petitioner presented the *Batson* claim as well as his ineffective assistance of trial counsel claim, a violation of his federal right under Sixth Amendment to the United States Constitution, in his post-conviction papers at the trial court level and an appeal to the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court (Docket Entry No. 7, Attachments thereto, Addenda Nos. 7; 8 at pp. 24-25; 11 at p. 2).

## III. THE *KEENEY* HEARING ISSUE

In accordance with the Sixth Circuit's remand, the Magistrate Judge considers the threshold issue to be: whether the petitioner has established cause and prejudice so as to allow the evidence from the prior evidentiary hearing in this case to be considered on remand of the *Batson* claim and his claims of ineffective assistance of counsel at trial and on direct appeal.

First, the Magistrate Judge concludes that in ordering the first evidentiary hearing that the Court was relying upon the former version of 28 U.S.C. § 2254(d)(8) because the state record on the *Batson* claim was insufficient to decide that claim. This insufficiency was due to the fact that the state prosecution did not explain or testify before the state courts on why he struck the black juror from the panel. *Batson* requires the prosecutor to state a neutral reason for such a decision. 476 U.S. at 97.

As the Sixth Circuit stated, the *Keeney*[2] test on whether a hearing should be held is as follows:

> [A]n habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing *only* if he shows (1) cause for his failure to develop the facts in state court proceedings and actual prejudice

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[2] As the Sixth Circuit noted in *Mitchell*, the former 28 U.S.C. § 2254(d) has been amended and the pertinent section of the habeas statute is now 28 U.S.C. § 2254(e). 114 F.3d at 576 n.7. The Sixth Circuit did not address the effect of this amendment. *Id.* Some courts have held that *Keeney* survives the statutory change. *See e.g. Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997). In any event, the Sixth Circuit remanded for consideration in light of its holding applying *Keeney*. The Magistrate Judge is bound to apply *Keeney*.

> from that failure' or (2) 'that a fundamental miscarriage of justice would result from the failure to hold an evidentiary hearing.

*Mitchell*, 114 F.3d at 577 (quoting *Keeney*, 504 U.S. at 11-12).

In *Keeney*, the Supreme Court extended the procedural default doctrine to the procedural issue of whether to hold an evidentiary hearing on a habeas claim, but only as to showing of its cause and prejudice components. *Keeney*, 504 U.S. at 10. For this reason, the Magistrate Judge concludes that he does not need to address the other elements of procedural default for the substantive claims. In its reversal, the Sixth Circuit cited the Court's failure to apply this standard in authorizing the earlier evidentiary hearing. *Id.* at 579.

Here, the initial cause for the failure to develop a full record on the *Batson* claim was the omissions of petitioner's trial counsel. As stated below in more detail, the facts in the state court record reflect that trial counsel actually perceived that the prosecutor's striking of the black jury panel member was racially motivated. Yet, petitioner's trial counsel did not make any challenge to that strike and did not develop any record to force a justification for this strike. Petitioner's trial counsel testified that given the facts of the case, racial prejudice was a major factor or concern at this trial and with the jury (Docket Entry No. 7, Addendum No. 2, Post-Conviction Transcript at p. 114). The interracial factor of the crime and the nature of the crime can provide the motive for racially tainted use of peremptory challenges. *Johnson v. Love*, 40 F.3d 658, 665 (3d Cir. 1994). Given these core facts and the more specific findings set forth below, the Magistrate Judge concludes that based upon the

existing state court record, petitioner's trial counsel was ineffective for his failure to raise a *Batson* challenge.

For purposes of establishing the cause element under the procedural default doctrine the Sixth Circuit stated "[a]n attorney error that amounts to ineffective assistance of counsel can constitute such 'cause'". *Gravely v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996) (citing *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). 501 U.S. at 753-54). With the Magistrate Judge's conclusion on the ineffectiveness of petitioner's trial counsel that is based upon the state court record, the Magistrate Judge also concludes that the petitioner has satisfied the cause element of the *Keeney* test.

For the prejudice element of the *Keeney* test, the Sixth Circuit adopted the prejudice component of the test in *Stickland v. Washinton*, 466 U.S. 668, 686 (1984) that prejudice is shown where "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Gravely*, 87 F.3d 785 (quoting *Strickland*, 466 U.S. at 687). The Supreme Court has also stated that counsel's error must not render the "fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

As discussed in more detail below, the Magistrate Judge concludes that petitioner's trial counsel's omissions on the *Batson* challenge were prejudicial to the petitioner. The omission deprived the petitioner of a fundamental right and tainted the trial by depriving a black citizen of a right to serve on a jury that are the underpinning of the *Batson* holding. *Infra* at pp. 16-19. A challenge to the striking of the black juror may have left off the jury a juror who would not have found the

evidence sufficient to convict, a Tennessee Court of Criminal Appeals later found. Only one juror's vote is necessary to preclude a conviction. A timely challenge deprived the petitioner of a remand on direct appeal which fact the Third Circuit has found sufficient to show prejudice. *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62-63 (3rd Cir. 1989), *aff'd after remand*, 904 F.2d 694 (3rd Cir. 1990), *cert. denied*, 500 U.S. 954 (1991).

Accordingly, the Magistrate Judge concludes that petitioner has satisfied the cause and prejudice components of the *Keeney* test to justify an evidentiary hearing. Because the Magistrate Judge finds that petitioner's trial counsel's conduct was deficient and prejudicial, the respondent's argument about the legal inability to establish cause from inadequate counsel at the post-conviction proceeding lacks merit.

Upon a review of the transcript from the earlier evidentiary hearing in this Court (Docket Entry No. 64). The Magistrate Judge concludes that an additional hearing is unnecessary.

## IV. THE MERITS OF THE CLAIMS

### A. *Batson* Claim

Based upon a review of the state court record and the evidentiary hearing in this Court, the Magistrate Judge adopts as his findings of fact and conclusions of law on the *Batson* claim earlier those findings and conclusions stated by the Court.

> The evidence before the Court indicates that he respondent's explanation for the peremptory challenge of the black

juror,[3] Ms. Alderson, is pretextual and the petitioner has carried his burden of proving purposeful discrimination. During the evidentiary hearing, the prosecutor, Mr. Bottoms, testified that he struck Ms. Alderson because of her elderly appearance, as he believed that she would be unable to follow the evidence in the case.[4] Transcript of evidentiary hearing (filed June 1, 1995; Docket Entry No. 67) at 22. He further testified that the reason he challenged Ms. Alderson was "probably" because she was elderly. *Id.* at 24-25. Because a discriminatory intent is not inherent in this explanation, the respondent's reason is deemed to be racially neutral. *See Hernandez*, 500 U.S. at 360.

However, the evidence before the Court leads to the conclusion that his racially neutral explanation, however characterized, is not worthy of belief. As an initial matter, it is undisputed that Mr. Bottoms failed to strike white jurors who were older than Ms. Alderson. Although the evidence indicates that Mr. Bottoms was unaware of the jurors' specific ages, the Court notes that a number of white jurors who were not challenged by Mr.

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[3] The only other black juror was excused by the trial court for cause after Ms. Alderson was peremptorily struck by the respondent.

[4] Mr. Bottoms explained that the state's case consisted of circumstantial evidence. Transcript of evidentiary hearing (filed June 1, 1995; Docket Entry No. 67 at 22).

Bottoms were older than Ms. Alderson, one of whom was eleven years older. *See* transcript at 38-41.

Furthermore, Mr. Bottoms did not identify any objective criteria upon which to base his conclusion that Ms. Alderson was unable to follow the evidence because of her elderly appearance. Specifically, he did not indicate that she looked particularly frail or infirm in any way which might signify a physical condition which would render her less able to follow the course of the trial. Rather, Mr. Bottoms acknowledged that he could not specify what aspect of Ms. Alderson's appearance led him to conclude that she would be unable to follow the evidence. *Id.* at 35-36. Likewiase, he admitted that he could not recall anything about her demeanor.[5] *Id.* at 51.

Mr. Bottoms' questions during voir dire examination support an inference of discriminatory purpose. *See Batson*, 476 U.S. at 97. For example, it is significant that Mr. Bottoms asked Ms. Alderson no questions individually, relying solely upon her responses to questions directed to a group of three jurors which included Ms. Alderson. Transcript at 32-34. Mr. Bottoms acknowledged that the only question Ms. Alderson answered differently from the

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[5] Unfortunately, Mr. Bottoms was unable to locate his file containing his trial notes on his reasons for striking Ms. Alderson.

other two jurors was with regard to her experience of serving on many juries.[6] *Id.* at 46, 51. Nonetheless, a white juror in this group, Ms. Stephens, who was slightly over one year younger than Ms. Alderson, was not challenged by Mr. Bottoms.[7] *Id.* at 43.

Furthermore, Mr. Bottoms failed to ask Ms. Alderson any questions concerning her health, physical condition, mental state or general ability to follow the court proceedings. Although Mr. Bottoms did not know Ms. Alderson's age and claimed to have concerns due to her elderly appearance, he failed to ask her any questions to elicit her age or other information relevant to his concerns. He did not ask any questions to determine whether her age, physical condition or health would have an impact on her ability to serve as a juror.

Moreover, the conclusion that the respondent's proffered neutral explanation is pretextual is further supported by Mr. Bottoms' reliance on general assertions and his failure to recall precisely why he concluded Ms. Alderson would be unable to follow the evidence. It is curious that Mr. Bottoms' trial notes documenting his reasons for striking Ms. Alderson are

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[6] The Court notes that Ms. Alderson's extensive previous jury service might be considered to be a variable which would enhance her ability to understand and follow court proceedings.

[7] Although not challenged by the state, Ms. Stephens was apparently struck by the defendant.

nowhere to be found,[8] although other parts of the trial file were located. In addition, Mr. Bottoms testified that two other prosecutors tried the case and participated in the voir dire and that all three prosecutors agreed on the peremptory strikes. *Id.* at 21. Despite this fact, the respondent failed to call the other two prosecutors with whom Mr. Bottoms consulted the trial in an effort to overcome the absence of documentation and Mr. Bottoms' failure to recall.

Finally, Mr. Bottoms' testimony that he knew he had a good reason for striking Ms. Alderson or he would have done so because he does not challenge jurors for race is clearly insufficient. As noticed by the Supreme Court, a prosecutor may not rebut the defendant's case "merely by denying that he had a discriminatory motive or 'affirm[ing [his] good faith in making individual selections.'" *Batson*, 476 U.S. at 98 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

B. The Ineffective Assistance of Counsel Claims

1. Findings of Fact

As to the petitioner's ineffective assistance of counsel at trial and on appeal, the state post-conviction transcript reveals that in response to a question about blacks on Mitchell's jury, his trial

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[8] The Court finds it passing strange that Mr. Bottoms' notes concerning Ms. Alderson were not turned over to the attorney general's office along with the rest of his documentation of this trial.

counsel testified: "I know the state excused several. And Mr. Mitchell is right, you know. I probably told him something to the effect that, you know: 'I think what they're doing is excusing as many blacks as they can . . . they're doing is excusing as many blacks as they can.'" (Docket Entry No. 7, Attachment thereto at Addendum No. 2, State Post-Conviction Transcript at p. 111-12. As to what he did thereafter, the state court record reflects as follows:

> Q. Now, did you think to challenge—once you saw that the first black person was struck and then saw maybe a second black person struck—did you think of challenging the state to determine whether or not they were establishing a pattern of striking persons strictly on the basis of race?
>
> A. I did not do that.
>
> Q. Did it occur to you sir?
>
> A. To challenge them on that issue, no. I told Mr. Mitchell and thought that's what they were trying to do.

*Id.* at p. 113.

In later questioning, petitioner's trial court stated on whether he pursued the issue of racial prejudice with the jury, trial counsel stated "that was a major concern of mine, especially when I saw that they were excluding every black man on the jury. I mean, you'd have to be an idiot not to figure out what they were doing." *Id.* at tr. 114-15. The state found this evidence insufficient to show ineffective assistance of trial counsel without elaboration (Docket Entry No. 7, Addendum No. 10, Tennessee Court of Criminal Appeals Opinion at pp. 1).

2. Conclusions of Law

Before stating the conclusions of law on this claim, the Magistrate Judge addresses this conclusion of the Tennessee Court on this issue and the statutory presumption of correctness under the former 28 U.S.C. § 2254(d). In *Strickland v. Washington*, 466 U.S. 668, 689 (1984), the Supreme Court explained that "in a federal habeas challenge to a State criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal courts to the extent [the former]. 28 U.S.C. § 2254 [now codified as 28 U.S.C. § 2254(e)]. Accord *Lewandowski v. Makel*, 949 F.2d 884, 888 (6th Cir. 1991). Thus, the Tennessee Court's conclusions on this claim are not binding upon this Court.[9]

To establish ineffective assistance of counsel in violation of a state defendant's Sixth Amendment right to counsel, the petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and the result unreliable, *Lockhart*, 506 U.S. at 369; *Strickland*, 466 U.S. at 687 or counsel's conduct produced a result that is "fundamentally unfair 'or unreliable'". *Lockhart*, 506 U.S. at 369. Serious deficiencies of counsel are imputed to the State.

> . . . if the result . . . [is] ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not 'conduc[t] trials

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[9] In contrast, a *Batson* violation is essentially a factual determination, *Hernandez v. New York*, 500 U.S.352, 364 (1991), to which the statutory presumption would apply.

> at which persons who face incarceration must defend themselves without adequate legal assistance.' *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

*Murray v. Carrier*, 477 U.S. 478, 488-89 (1986).

Yet, judicial scrutiny of counsel on the deficiency of performance must be highly deferential. The Court should begin with 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' *Strickland*, 466 U.S. at 689. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* As the Sixth Circuit stated

> The Supreme Court recognized that in the context of ineffective assistance claims based on counsel's 'failure to investigate,' the temptation to rely on hindsight is particularly strong. Consequenlty, the Court made clear that '*strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable . . . .*' *Id.* at 690. However, '*strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular*

*investigations unnecessary.*" *Id.* at 690-91 (emphasis added).

*Sims v. Livesay*, 970 F.2d 1575, 1579, 1580 (6th Cir. 1992). *Accord Ward v. United States*, 995 F.2d 1317, 1321 (6th Cir. 1993) ("the essential question is whether better lawyering would have produced a different result.)

In this Circuit, the failure to investigate key evidence without adequate justification can constitute ineffective assistance of counsel. *Sims*, 970 F.2d 1580-81. *Martin v. Rose*, 717 F.2d 295 (6th Cir. 1983) (counsel's failure to interview alibi witnesses and lack of knowledge of the investigative file that was assembled by the public defender's office, resulted in ineffective assistance of counsel). Counsel's failure to make a *Batson* challenge in a racially charged case is ground for habeas relief in somewhat similar circumstances. *Forte*, 865 F.2d at 62-63.

For the prejudice component, the petitioner must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S.694.

Here, the case involves a trial counsel who was conscious of a racial discrimination in the prosecutor's striking of black juror's in a trial involving an interracial crime, yet, trial counsel did nothing. This Court has found the prosecutor's strike of the black juror to be racially motivated. Court have recognized that the interracial nature of the case can supply a motive for the prosecutor to eliminate blacks from a jury. *Johnson*, 40 F.3d at 665. Petitioner's right to be free of such discriminatory conduct is clear and the Third Circuit has found prejudice in this instance

where the petitioner lost the opportunity for a remand on direct appeal for a *Batson* violation due to counsel's omission.

> We know that the trial attorney's ineffectiveness had no impact on the result at the trial. See also, *United States v. Canel*, 569 F. Supp. at 932-33. But we do not end our analysis at the trial for we think it is also clear that had the objection been made Forte would have been successful on this direct appeal in having the matter remanded for a determination of whether there had been a *Batson* violation. When we rejection Forte's *Batson* claim we did so because he had not preserved it, not because it was meritless. Certainly Forte showed on his first appeal and continues to show that he is a member of a cognizable racial group and that the prosecutor exercised peremptory challenges to remove members of his group from the jury. In these circumstances there is an inference of purposeful discrimination and thus if *Batson* had been applied on the direct appeal we wou'd have required the prosecutor to come forward with a neutral explanation for challenging white jurors. 476 U.S. at 97-98. While we realize that ordinarily the *Strickland* principles are advanced when the contention is made that the trial cannot be relied upon to have produced a just result, we see no logical reason why they should not be applicable when the defendant was denied a just

> result on appeal because of the ineffectiveness of his attorney at trial.

*Forte*, 865 F.2d at 64.

As the Sixth Circuit in the first appeal in this case noted, the *Batson* violation and the related ineffectiveness assistance of counsel claim could be grounds for habeas relief. 114 F.3d at 379, n. 13.

*Batson* established a fundamental right in a criminal proceeding beyond the interest of the defendant. As the Supreme Court stated in *Batson*, the Equal Protection Clause of the Fourteenth Amendment prohibits the state's exclusion of potential jurors solely on account of their race or "on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant." In a word, a defendant has "the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria. *Id.* at 86. In *Powers v. Ohio*, 499 U.S. 400 (1991), the Supreme Court explained that in *Batson*,

> We spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded. But we did not limit our discussion in *Batson* to that one aspect of the harm caused by the violation. *Batson* "was designed 'to serve multiple ends,'" only one of which was to protect individual defendants from discrimination in the selection of jurors . . . . *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large.

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.
>
> * * *
>
> Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate int he democratic process.
>
> While States may prescribe relevant qualifications for their jurors. . . a member of the community may not be excluded from jury service on account of his or her race.
>
> * * *
>
> Racial discrimination in the jury selection process cannot be tolerated.

*Id.* at 406-07, 409 (citations omitted).

As the late Judge Leon Higginbottom observed about *Batson's* holding and its multiple aspects

> Thus, if tension exists between the "old tradition" of unconsidered preference for unfettered use of peremptory challenges and the still relatively "young tradition" of meaningful safeguards against invidious

> application of racial stereotypes, then the latter consideration must prevail. If the former consideration still prevailed, the "price" would be the jeopardizing of the integrity of the judicial process and the stigmatization of venire persons of color. And such a price would be "too high". Indeed, the Supreme Court has recognized the role and value of the *Batson* rule in eliminating racial stereotyping, preserving the integrity of the judicial process, protecting the right of a defendant to a fair trial, and affirming the right of venire persons not to be excluded from serving on a jury because of their race.

*Jones v. Ryan*, 987 F.2d 960, 968 (3rd Cir. 1993) (citations omitted).

The prospective juror who was struck was denied a fundamental by the state prosecutor. Mitchell's trial counsel failed to pursue *any* challenge to the denial of this right by the state prosecutor. Trial counsel's failure to pursuant *any* challenge to the prosecutor's conduct occurred when he was clearly aware of its racial motivation. An examination would have revealed that the prosecution's strike was racially motivated, as trial counsel perceived it to be at the time. As this Court found earlier, an inquiry would have revealed the lack of a neutral reason for the prosecutors strike of the black juror. *Batson* contemplates timely objections to such conduct. *Batson*, 476 U.S. at 99. ("we decline . . . to formulate particular procedures to be followed upon a defendant's *timely* objection to a prosecutor's challenges.") (emphasis added and footnote omitted).

Such a complete omission, in a racially charged case as here denies the petitioner a fundamental and clearly established right to a fair trial. The prosecutor's wrongful conduct and petitioner's trial counsel's failure to challenge it deprived Mitchell of an effective direct appeal and prejudiced the integrity of the trial as contemplated by *Batson*. The Tennessee Court of Criminal Appeals opinion also reflects that a juror could have found the petitioner not guilty of some offenses.

In sum, the Magistrate Judge concludes that petitioner's trial counsel's failure to make a contemporaneous challenge and a record of why the prosecutor struck this juror were serious deficiencies in his duty to represent the petitioner. This Court's earlier finding that the State prosecutor acted with racial bias, demonstrates sufficient probability of unfairness that undermines confidence in the trial and jury that convicted the petitioner. Petitioner's proof satisfies the deficiency and prejudice elements for his ineffective assistance of counsel at trial and direct appeal claim. Thus, the petitioner should be granted the writ on his ineffective assistance of counsel at trial and direct appeal claim. Thus, the petitioner should be granted the writ on his ineffective assistance of counsel claim, and a new trial within ninety (90) days, if the Court adopts this conclusion.

V. RECOMMENDATIONS

For the reasons stated earlier, the Magistrate Judge concludes that the petitioner's motion for summary judgment (Docket Entry No. 114) be granted and that the petitioner be granted the writ, but the State should be given ninety (90) days in which to re-try the petitioner. Under Rule 8(b)(3) of the Rules Governing § 2254 Cases, any party has ten (10) days

from the receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

ENTERED this 15th day of January, 1999.

WILLIAM J. HAYNES, Jr.
United States Magistrate Judge

## APPENDIX E

## UNITED STATES COURT OF APPEALS,

## SIXTH CIRCUIT

**Joe Clark MITCHELL, Petitioner-Appellee, Cross-Appellant,**

**v.**

**John REES, Respondent-Appellant, Cross-Appellee.**

**Nos. 95-6232, 95-6397**

**May 29, 1997**

## OPINION

Before: KEITH, SILER, and BATCHELDER, Circuit Judges

BATCHELDER, J., delivered the opinion of the court, in which SILER, J., joined. KEITH, J. delivered a separate dissenting opinion.

BATCHELDER, Circuit Judge.

Joe Clark Mitchell filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Tennessee. The district court granted the petition and issued the writ. Respondent-Warden John Rees appeals, and the petitioner cross appeals.

### I. BACKGROUND

#### A. State Court Proceedings

Petitioner was indicted in 1982 by a Maury County, Tennessee, grand jury on charges of

aggravated sexual battery, arson, first-degree burglary, and two counts each of aggravated assault, armed robbery, and aggravated kidnapping, and in 1983, in a second indictment, on two charges of aggravated rape, all arising out of the same incident. His trial took place in September 1986.[1] The trial court dismissed the aggravated-sexual-battery charge, and the jury convicted Mitchell on the remaining charges. In affirming the conviction, the Tennessee Court of Criminal Appeals rejected all but one of Mitchell's contentions that the evidence was insufficient to support his conviction. Because the evidence did not support the second aggravated-rape conviction, the court reduced that conviction to simple rape and reduced the sentence accordingly. *State v. Mitchell*, No. 87-152-III, 1988 WL 32362, at *1, *4 (Tenn.Crim.App. April 7, 1988), permission to appeal denied, (Tenn. June 27, 1988). The petitioner's

> convictions arose out of a single crime spree during which two women, one quite elderly, were terrorized for several hours. One of the victims testified that as she was leaving her friend's house, a man started towards her across the lawn. He hit her several times with a large stick, and he was armed with a gun and a hunting knife. He forced both women into the house, used duct tape to tape

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[1] The delay between indictments and trial was attributable in part to the fact that Mitchell fled the jurisdiction and for some two years fought extradition. The record reflects that after he was eventually returned to Tennessee, Mitchell and his trial counsel adopted the trial strategy of postponing the trial for as long as possible in the hope that the more elderly of his alleged victims would die and her testimony against him would thus be eliminated. This strategy was successful.

> their ankles, arms, mouths, and eyes. He stole their jewelry and ransacked the house. He used a knife to cut the clothes off the testifying witness and raped her. Then he set fire to the house. He carried both women to a car, drove around for several hours, stopping at one point to rape the witness one more time. He eventually abandoned the car and the women, and they were able to free themselves and walk for help....
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> [A] witness ... testified that the defendant had discussed robbing Mrs. Chapman, one of the victims, on two previous occasions. The conversations took place about two months prior to offenses in this case.

*Id.* at *1-2.

In December 1988, Mitchell filed pro se a petition for post-conviction relief in the Circuit Court of Maury County, Tennessee, under the Post-Conviction Procedure Act, Tenn.Code Ann. §§ 40-30-101 to 40-30-124 (1990) (repealed 1995).[2] The petition included several claims of ineffective assistance of trial and appellate counsel,[3] including a claim that counsel had

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[2] Tennessee has a new Post-Conviction Procedure Act, Tenn.Code Ann. §§ 40-30-201 to 40-30-222 (Supp.1996), which applies to post-conviction petitions filed after May 10, 1995, and any motions filed after that date to reopen petitions concluded before that date. Tenn.Code Ann. § 40-30-201 (Compiler's Notes). Petitioner does not contend that the new act has any application here.

[3] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

failed to challenge the make-up of the jury pool in Maury County, which, according to Mitchell, unconstitutionally excluded blacks. The circuit court held an evidentiary hearing, at which Mitchell was represented by counsel, on all of the claims raised in the petition. Although Mitchell had not raised at trial, on direct appeal or in his post-conviction petition any claim under *Batson v. Kentucky*, 476 U.S. 79 (1986),[4] or any claim that his trial and direct-appeal attorney had been ineffective for not raising *Batson*,[5] the circuit

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process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

[4] *Batson* reaffirms that the "Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race," 476 U.S. at 86 (emphasis added) (citing *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 305 (1879)), and holds that the Equal Protection Clause prohibits a prosecutor from challenging "potential jurors solely on account of their race ..." *Id.* at 89. *Strauder* addresses the composition of the venire, while *Batson* addresses the composition of the jury. *Batson* established that a defendant may challenge the use of peremptory strikes by relying on facts in his case alone, a test that is easier for the challenger than the test of *Swain v. Alabama*, 380 U.S. 202 (1965). *See* 476 U.S. at 91-93. Although *Batson* itself applied to prosecutorial strikes of potential jurors of the same race as the criminal defendant, 476 U.S. at 96 (setting forth the prima facie case, for *Batson* Step 1); *United States v. McCoy*, 848 F.2d 743, 745 (6th Cir.1988) (same), subsequent opinions hold that the inquiry is whether a potential juror was excluded because of his race, regardless of whether he was of the same race as the defendant. *See Powers v. Ohio*, 499 U.S. 400, 415, (1991). Other opinions apply the Batson principle in the context of strikes by the criminal defendant, *Georgia v. McCollum*, 505 U.S. 42, 59 (1992), strikes by civil litigants, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991), and strikes based on sex. *J.E.B. v. Alabama*, 511 U.S. 127, 127, 145 (1994).

[5] Under the Post-Conviction Procedure Act in effect when Mitchell filed his state post-conviction petition, see supra at 572 n. 1, the

court permitted Mitchell's counsel to introduce evidence relative to the *Batson* claim during the evidentiary hearing. At the conclusion of the hearing, the circuit court ruled from the bench that the petition should be dismissed, holding that none of Mitchell's

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petitioner is entitled to a hearing on any ground for relief except those that have been either waived or previously determined. Tenn.Code Ann. § 40-30-111. "A ground for relief is 'waived' if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn.Code Ann. § 40-30-112(b)(1). "There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived." *Id.* § (b)(2).Mitchell's post-conviction petition contained no claim that the prosecutor had impermissibly used peremptory challenges to strike black jurors from the jury. However, over the state's tepid objection, the state circuit court permitted both the petitioner and his trial counsel to testify at the hearing on the post-conviction petition that the prosecution had stricken blacks from the jury, *Mitchell v. State*, No. 01-C-01-9007-CC-00158, 1991 WL 1351, at *1 (Tenn.Crim.App. Jan.11, 1991), permission to appeal denied, (Tenn. April 15, 1991). The petitioner did not seek to present any other evidence on this issue. The petition did contend that Mitchell's trial and direct-appeal attorney was ineffective for failing to (1) challenge the alleged exclusion of felons from "the jury pool from which the grand and trial jury was selected," i.e., the venire, (2) challenge the alleged exclusion from "the jury pool [from] which the trial jury was selected" of a fair representation of blacks in proportion to the black population of Maury County, and (3) challenge, during voir dire, the alleged racial prejudices of jurors. Of these three contentions, the transcript of the post-petition hearing reveals that the petitioner waived the first, and the court held that the second and third "absolutely have no merit." None of these is a *Batson* claim. However, the state conceded at oral argument before us that it never raised the issue of procedural default, i.e., the state never contended that the petitioner had waived his *Batson* claim, and the state does not argue that position in its brief, and therefore whether this claim was waived under Tennessee law is not before us.

claims had any merit. The circuit court did not specifically address the *Batson* issue.

U.S. CONST. AMEND. VI. The Supreme Court has held that the Fourteenth Amendment makes the Sixth Amendment applicable to the states. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963), overruling *Betts v. Brady*, 316 U.S. 455, 462 (1942).

Mitchell appealed to the Tennessee Court of Criminal Appeals, reiterating his ineffective-assistance claims and, in addition, explicitly raising both a *Batson* claim and a claim of ineffective assistance of counsel for failure to raise the *Batson* issue. The state appellate court affirmed. On the ineffective-assistance claims, the court stated:

> The trial judge found from the evidence introduced at the hearing on this case, that trial counsel was competent.
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> The only evidence was the testimony of the appellant and the trial attorney who represented him in the convicting trial.
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> We can readily see why the trial judge ruled counsel was competent. The testimony shows trial counsel was well prepared in this case and gave sound advice to the appellant. The appellant's testimony reflects diminished credibility on his part. The record supports the finding of the trial judge on the question of competency.

*Mitchell*, 1991 WL 1351, at *1. The appellate court explicitly addressed the *Batson* issue and made the following findings of fact:

> The appellant testified there were blacks among the venire summoned as prospective jurors for his trial. He further testified the district attorney general used peremptory

> challenges to remove those called for his case. He further testified no black juror sat on his case.
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> Trial counsel testified there were blacks in the venire. He was less definite on whether blacks were on this particular panel. The attorney testified he probably told this appellant, as testified to by the appellant, that the state was excusing the black jurors.
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> The record does not show how many peremptory challenges were used by the state or whether the district attorney general exercised peremptory challenges to excuse those who were not a member of the minority class involved in this complaint; nor does the record show whether there were other black persons left in the venire who might have been called to serve in this case.
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> We conclude the lack of evidence on the Batson issue does not justify this Court upsetting the judgment entered in the original cases.

*Id.*

B. Federal Court Proceedings

In April 1993, Mitchell filed his § 2254 petition in the federal district court, which in August 1993 dismissed all but one of the claims. Two of the claims which the district court promptly dismissed alleged that Mitchell had ineffective assistance of counsel vis-vis *Batson* and other issues, and that there was insufficient evidence to convict him. The sole claim that the district court did not dismiss was the *Batson* claim itself (not the related ineffective-assistance claim) as stated in the federal habeas petition. The district court referred that claim to a magistrate judge

for an evidentiary hearing, citing 28 U.S.C. § 636(b) and Habeas Corpus Rule 8(b)(1).

The magistrate judge held the hearing and recommended that the habeas petition be denied. The district court rejected that recommendation and granted the petition, ordering the warden to release Mitchell within 90 days unless the state began a retrial within that time. The state timely appealed the granting of the petition, and Mitchell cross-appealed, challenging the district court's earlier order dismissing his claims of ineffective assistance of counsel and insufficiency of the evidence. In September 1995, the court granted the warden's motion to stay pending appeal.

II. DISCUSSION

The state asserts that the district court erred in ordering an evidentiary hearing on the *Batson* claim, because the state court made relevant findings that should have been presumed correct. Claiming that the petitioner has asserted none of the factors enumerated in 28 U.S.C. § 2254(d) that would permit the district court to disregard the state court's findings, the respondent urges us to hold that the state court's findings were correct.

The petitioner asserts that the respondent did not object to the magistrate judge's report and recommendation, and did not raise in the district court the issue of whether petitioner was entitled to an evidentiary hearing; consequently, petitioner maintains that respondent is precluded from objecting to the hearing now. In support of this assertion, the petitioner cites *Thomas v. Arn*, 474 U.S. 140, 144-48 (1985) (upholding the rule of *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir.1981), that a party, by not objecting in the district court to the magistrate

judge's report and recommendation, waives a right to appeal to this court); petitioner, however, provides no case law that applies the *Walters* rule in the circumstances peculiar to this case.

We conclude that the district court erred in ordering an evidentiary hearing on petitioner's *Batson* claim and in granting the petition for the writ. We further hold that the state is not precluded from raising on appeal its objection to the district court's having held that evidentiary hearing.

We begin with the application of 28 U.S.C. § 2254(d),[6] which establishes a presumption of

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[6] 28 U.S.C. § 2254(d) provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

correctness for factual determinations made by the state courts whose judgments are challenged by the federal habeas petitioner.[7] The Supreme Court, in *Sumner v. Mata*, 449 U.S. 539 (1981), held that § 2254(d) mandated that the presumption of correctness be applied by the habeas court to a finding of the state appellate court that " 'the facts of the present case' did not adequately support respondent's claim." *Id.* at 546.[8] The Court went on to lay down the rule that "a

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(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such a factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

[7] After the judgment granting the petition was entered, 28 U.S.C. § 2254 was amended. Neither of the parties has raised the issue of the applicability of the amended statute in this case, and we do not address that issue.

[8] In *Sumner*, the Court held that the habeas petitioner ("Respondent" in the Supreme Court Proceedings) had received the "hearing" required by 28 U.S.C. § 2254(d), even though the factual determinations had been made by the state court of appeals after review of the trial court record. "Both the

habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Id.* at 551. The reason for this requirement, the Court explained, is that "[n]o court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)." *Id.* And in a footnote, the Court further explained that "the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of [federal court] jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) and have repeatedly since reaffirmed, 'it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded.'" *Id.* at 548, n. 2.[9]

In the case before us, the state appellate court

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respondent and the State were formally before the court. Respondent was given an opportunity to be heard and his claim received plenary consideration even though he failed to raise it before the trial court." *Sumner*, 449 U.S. at 546, 101 S.Ct. at 768. In the case before us, the habeas petitioner was permitted to, and did, present evidence relative to his *Batson* claim at the evidentiary hearing on his post-conviction proceeding, even though he had failed to plead such a claim in his post-conviction petition. The trial court, without mentioning the *Batson* claim in particular, ruled that all of petitioner's claims were meritless, but the court of criminal appeals reviewed all of that evidence, and made specific findings, including the finding that the lack of evidence on the *Batson* claim did not justify setting aside the conviction.

[9] For this reason, petitioner's contention here that the state has waived its right to object to the evidentiary hearing is without merit.

reviewed the evidence presented in the course of the hearing on the post-conviction petition, made findings of fact both as to what the record did show and what it did not show in regard to the *Batson* claim, and held that "the lack of evidence on the *Batson* issue does not justify this Court in upsetting the judgment entered in the original cases." Like the state appellate court finding in *Sumner*, this finding is entitled to the presumption of correctness mandated by § 2254(d) unless one of the enumerated exceptions in that section applies. The district court, however, neither gave any deference to that finding nor made any reference at all to § 2254(d). Rather, in spite of its explicit acknowledgment that "The Tennessee Court of Criminal Appeals found that there was insufficient evidence in the record to rule upon this claim," the district court ordered that the magistrate judge conduct an evidentiary hearing on the claim, stating that "This Court cannot, however, ignore the facts in this record which suggest that the prosecution may have acted improperly."

Because § 2254(d) is an express limitation on the district court's jurisdiction, a district court is without authority to hold an evidentiary hearing on a matter on which the state court has made findings unless one of the factors contained in § 2254(d) applies. It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Id.* at 551. We are satisfied that the district court could not have proceeded on the basis of §

2254(d)(8), since, as we more fully explain below, the state appellate court's finding that there was insufficient evidence of a Batson violation is "fairly supported" by the record of the state court proceedings. It is, however, implicit in the district court record that the petitioner and the court proceeded on the basis of § 2254(d)(3), "that the material facts were not adequately developed at the State court hearing."

Once a district court has properly determined that it may dispense with the presumption of correctness mandated by § 2254(d), the court has some discretion in determining whether to hold an evidentiary hearing. *See Lonchar v. Thomas*, 517 U.S. 314 (1996) (citing Habeas Corpus Rule 8(a); *Townsend v. Sain*, 372 U.S. 293, 318 (1963); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992); *see also Sims v. Livesay*, 970 F.2d 1575, 1579 (1992) (quoting *Townsend*, 372 U.S. at 318). However, an habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." *Keeney*, 504 U.S. at 11-12 (citing *McCleskey v. Zant*, 499 U.S. 467 (1991); *Murray v. Carrier*, 477 U.S. 478, 496 (1986)), overruling *Townsend* in part; *Mann v. Scott*, 41 F.3d 968, 985 (5th Cir. 1994) (holding that the habeas petitioner bears the burden of proof on both points (citing *Keeney*, 504 U.S. at 11-12)), cert. denied, 514 U.S. 1117 (1995). Therefore, a district court abuses its discretion by ordering such a hearing without first requiring the petitioner to make the requisite

showing.[10]

In its answer to the petition for the writ, the state explicitly claimed that the state courts had made findings of fact with regard to the *Batson* claim and that petitioner had made no showing of any factor under § 2254(d) that would overcome the presumption of correctness of those findings. As the *Keeney* Court made clear, 504 U.S. at 8-9, petitioner had the burden of developing the factual record on his *Batson* claim in state court. The Tennessee Court of Criminal Appeals accurately summarized all of the evidence relative to Mitchell's claim of a *Batson* violation presented during the hearing in the post-conviction proceeding. We conclude, as that court did, that the petitioner failed to sustain that burden.[11]

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[10] A district court abuses its discretion when it "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *First Technology Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 647 (6th Cir.1993) (citation omitted); *see also Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir.) (citations omitted), cert. dismissed, 469 U.S. 1200 (1985).

[11] Unlike the view expressed in the dissent, we think that the cause and prejudice requirement is essential to the safeguarding of the principles of comity and federalism. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 126-28 (1982). The dissent fails to recognize that the petitioner's failure to develop in the state court proceedings the material facts necessary to support his constitutional claims is a procedural default that can be excused by the federal habeas court only upon a showing of cause and prejudice. Similarly, the dissent fails to recognize that the state court's holding that the record contained insufficient evidence of a Batson violation to justify setting aside petitioner's conviction is a finding of fact entitled to deference under § 2254(d) just as the state court's finding in Sumner that "'the facts in the present case' did not adequately support respondent's claim" was entitled to deference. *Sumner*, 449 U.S. at 545. It is only by wholly disregarding the procedural record before us, and by shifting to

In order to have prevailed in state court on his claim of a *Batson* violation, petitioner was required first to establish a prima facie case of purposeful discrimination in the selection of the jury. *Batson*, 476 U.S. at 93-94. The prima facie case may be made by a defendant's showing "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 239-242 (1976)). And while such a defendant may make this showing through evidence of systematic exclusion of black jurors from service on juries in the particular jurisdiction, *id.* at 94-95, he may also make the showing by relying solely on the facts relative to the selection of the jury in his own case. *Id.* at 95.

> In deciding whether the [petitioner] has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative.

*Id.* at 96-97. Here, however, the record simply does not contain evidence of "all relevant circumstances," or of the "totality of the circumstances," either in the particular jurisdiction or in petitioner's particular

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the state court of criminal appeals the burden of adequately developing the factual record on petitioner's behalf, that the dissent is able to conclude that an analysis under *Keeney* is "inutile."

case. As the state court pointed out, there is no evidence of how many peremptory challenges were exercised by the state or whether any peremptory challenges were exercised by the state to excuse non-minority jurors. Without that evidence, the state court could not have determined whether the peremptory challenges were exercised in a "pattern" of strikes. There is no evidence in that record relative to the prosecutor's questions and statements during voir dire examination, or whether there remained any other black jurors in the venire who might have been called to sit on the petitioner's case. Our review of that record reveals that there is no evidence of a systematic pattern of excluding black jurors in criminal cases in the particular jurisdiction, or any other evidence relative to practices of jury selection in the jurisdiction that would raise an inference of discrimination. *Id.* at 94-95. When the trial court had before it nothing more than the petitioner's evidence that no blacks sat on his jury and that the state exercised peremptory challenges to strike blacks from the jury, the court could not consider "all relevant circumstances."

Because, as the state court of criminal appeals correctly concluded, there was insufficient evidence contained in the record to support a *Batson* challenge, or, as that court put it, "to justify ... upsetting the judgment entered in the original case," *Mitchell*, 1991 WL 1351, at *1, that record was inadequately developed to support such a challenge in the federal court as well. The district court was thus required to determine, using a cause-and-prejudice standard, whether petitioner was entitled to an evidentiary hearing on this claim. *Keeney*, 504 U.S. at 12.

> The state court is the appropriate forum for resolution of factual issues in the first

> instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings. This is fully consistent with, and gives meaning to, the requirement of exhaustion.... Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.... A different rule could mean that a habeas petitioner would not be excused for negligent failure to object to the introduction of the prosecution's evidence, but nonetheless would be excused for negligent failure to introduce any evidence of his own to support a constitutional claim.

*Id.* at 9-10 (citations omitted). Therefore, the district court erred in ordering an evidentiary hearing without requiring the petitioner to establish either (1) cause and prejudice for his failure to adequately develop the material facts in the state court proceedings, or (2) that not holding an evidentiary hearing would result in a fundamental miscarriage of justice.[12]

In sum, the district court erred in granting the petition for the writ. The petition was granted solely on the basis of the evidence adduced at the hearing ordered by the district court, and, as we have

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[12] Briefly stated, a fundamental miscarriage of justice occurs when the petitioner submits new evidence showing that a constitutional violation has probably resulted in a conviction of one who is actually innocent. *E.g., Schlup v. Delo*, 513 U.S. 298, 326-30 (1995); *Herrera v. Collins*, 506 U.S. 390, 402 (1993); *Sawyer v. Whitley*, 505 U.S. 333, 339-42 (1992); *McCleskey*, 499 U.S. at 494; *Murray*, 477 U.S. at 495-96.

explained, that hearing was ordered erroneously.

Finally, we find no error in the district court's dismissal of petitioner's claims of ineffective assistance of counsel[13] and insufficiency of the evidence. The district court found that the petitioner had failed to establish any basis to overcome the statutory presumption of correctness that attaches to the state court's findings of fact; that those findings were supported by the record; and that on those facts the claims were meritless.

III. CONCLUSION

Accordingly, we VACATE the order granting the petition for the writ of habeas corpus, VACATE the order for the evidentiary hearing, and REMAND this matter to the district court for further proceedings consistent with this order.

KEITH, Circuit Judge, dissenting.

I must dissent from the Majority Opinion because I am very disturbed that a panel of this Court would, based upon a less-than one page opinion by the Tennessee Court of Criminal Appeals, disregard the findings of a district court judge that Mitchell's constitutional rights were violated. The Majority states that the district court committed reversible error in ordering an evidentiary hearing on Mitchell's

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[13] We except from this holding the claim of ineffective assistance of counsel for failure to raise the *Batson* claim at trial or on direct appeal. If petitioner were able to demonstrate that he was entitled under *Keeney* to an evidentiary hearing on his *Batson* claim, and if he were then able to demonstrate that that claim had merit (an issue which we do not reach in this appeal), then he might also be able to prevail on this related ineffective assistance claim. We therefore hold that the judgment of the district court dismissing this claim is vacated, and the matter is remanded to the district court for further proceedings not inconsistent with this opinion.

*Batson* claim, and in granting his petition for the writ. Citing the Supreme Court's opinion in *Sumner v. Mata*, 449 U.S. 539 (1981), as the justification for its holding, the Majority maintains that the district court should not have held an evidentiary hearing on a matter on which the state court has made findings. Because the Majority's result-driven opinion is without legal basis and makes a mockery of the judicial concept of fundamental fairness, I dissent.

It is true that in *Mata*, the Supreme Court held that 28 U.S.C. § 2254(d) establishes a cloak of correctness over factual determinations made by state courts whose judgements are being challenged by federal habeas petitioners. *Mata*, 449 U.S. at 544-49. Section 2254 serves as a jurisdictional limit on the authority of federal courts where state courts of competent jurisdiction have made factual findings that are being challenged by a habeas petitioner. 28 U.S.C. § 2254(d). However, the Court also held in *Thompson v. Keohane*, 516 U.S. 99 (1995) that the presumption of correctness is only applicable when state courts have made findings, and then only to state court findings of historical fact. *See also, Wainwright v. Goode*, 464 U.S. 78, 83-85 (1983) (intimating that if a finding cannot be characterized as a finding of historical fact then the presumption of correctness does not apply); *Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (indicating that findings of historical fact are entitled to presumption of correctness). The Circuits that have addressed this issue have uniformly held that only historical findings of state courts are entitled to a presumption of correctness. *Berryman v. Morton*, 100 F.3d 1089, 1097 (3d Cir.1996); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 168 (3d Cir.1993); *Hunt v. Nuth*, 57 F.3d 1327, 1332 (4th Cir.1995) (stating that "[d]eterminations of

historical facts by the state court are presumptively correct"); *Edmond v. Collins*, 8 F.3d 290, 292 (5th Cir.1993) (maintaining that "presumption of correctness applies to ... historical facts underlying ... [a] state's ultimate conclusion of law"); *Milone v. Camp*, 22 F.3d 693, 698-99 (7th Cir.1994) ("State court findings of historical fact are presumed to be correct ... but questions of law or mixed questions of law and fact lack that presumption and are reviewed de novo.") (internal quotation marks omitted); *Haley v. Armontrout*, 924 F.2d 735, 740 (8th Cir.1991) (holding that state court "findings of specific historical fact are presumptively correct"); *Chacon v. Wood*, 36 F.3d 1459, 1465 (9th Cir.1994) (stating that "the ultimate state court determination of the effectiveness of counsel or of the voluntariness of a guilty plea is not subject to deferential review.... Rather, it is the state court's findings on questions of historical fact that are presumed to be correct under § 2254(d)"); *Steele v. Young*, 11 F.3d 1518, 1520 & n. 2 (10th Cir.1993) ("Explicit ... findings of historical facts by the state trial and appellate courts are presumed correct."); *McBride v. Sharpe*, 25 F.3d 962, 971 (11th Cir.1994) ("Of course, the statutory presumption of correctness applies only to findings of historical fact made by the state court, not to mixed determinations of law and fact.").

Even this Circuit, albeit in unpublished opinions, had heretofore recognized that only questions of historical fact are entitled to a presumption of correctness. In *Rhode v. Grayson*, 1994 WL 163645, *1, *3, this Circuit stated, matter-of-factly, that "[g]enerally, a finding of basic, historical fact made by a state trial court should be presumed correct unless a habeas petitioner shows error." Also, in *Staton v.*

*Parke*, 1993 WL 483210, *1, *2, this Court stated that the conclusory statement of the Kentucky Supreme Court holding that the available evidence in that case presented no reasonable basis to justify the instruction requested by the defendant was not a finding of historical fact entitled to a presumption of correctness. This Court stated that "[u]nlike a finding of historical fact, [which is entitled to a presumption of correctness,] this finding is not presumptively correct." The panel's holding in that case is patently at odds with the Majority's conclusion in this case. Admittedly, these opinions are not given the same precedential value as our published opinions, and, though there is no published caselaw from this Circuit directly on point, there is precedent from the Supreme Court and our sister Circuits that cannot simply be ignored.

In *Thompson v. Keohane*, 516 U.S. 99 (1995), the Supreme Court held that a state court's conclusion that a defendant was not "in custody" was not a finding of historical fact entitled to a presumption of correctness. *Id.* at 116 S.Ct. at 466-67. The Court defined findings of historical fact as findings of basic, primary, issues that reconstruct "what happened." *Id.* at 116 S.Ct. at 464-67. The Court then held that the state court finding that the defendant was in custody is not such an historical fact, but is rather a mixed question of fact and law. *Id.* Similarly, in *Berryman*, 100 F.3d at 1095, a panel of the Third Circuit held that "a state court's conclusion that counsel rendered effective assistance is not a finding of fact binding on" federal courts because "[e]ffectiveness is not a question of historical fact." (internal quotation marks omitted). Also, in *Chacon*, 36 F.3d at 1464, the Ninth Circuit refused to cloak a state court's findings with the presumption of correctness where there "was ... no

relevant state court finding to which deference was due." However, in *McBride*, 25 F.3d at 971, the Eleventh Circuit held that the state court's fact-finding procedure was entitled to a presumption of correctness because the state court made specific historical findings as to each of the issues raised by the defendant.

In the instant case, the Tennessee Court of Appeals did not make any findings of fact whatsoever. Even if one were to torture the Tennessee Court of Appeals conclusory statement into a finding of fact, it cannot be seriously contended that that court made a finding of historical fact. At best, that court's statement is a mixed question of law and fact, which is not entitled to the presumption of correctness. The Majority's lamentable opinion is not rehabilitated by its reliance on the Supreme Court's decision in *Mata*. In *Mata*, the Supreme Court respected the factual findings of the state court because it concluded that the state court made specific historical findings that were entitled to deference. There, a defendant challenged the pretrial photographic identification method employed in his case on the basis that his Fourteenth Amendment right to due process was violated. *Id.* at 542. The Supreme Court reversed the Ninth Circuit, which had found the pretrial identification process to be impermissible, on the grounds that the "findings made by the Court of Appeals for the Ninth Circuit are considerably at odds with the findings made by the California Court of Appeal." *Id.* at 543. The Court noted that the California Court found "that the photographs were available for cross-examination purposes at the trial[;] ... that there [was] no showing of influence by the investigation officers[;] that the witnesses had an

adequate opportunity to view the crime; and that their descriptions are accurate." *Id.* at 542. Based upon those historical factual findings, which determined "what happened," the California Court concluded that there was no error on the admission of the identification evidence because the "circumstances ... indicate the inherent fairness of the procedure." *Id.* at 542.

Given that the California Court of Appeal made factual findings, and the specificity of those findings, it is understandable why the Supreme Court determined that § 2254 precluded a federal court from overturning those findings unless they fell into one of the categorical exceptions enumerated in § 2254. Unlike the California Court of Appeal, which made specific factual findings and then concluded that there was no error in the admission of the identification, the Court of Criminal Appeals of Tennessee did not make any factual findings to support its conclusion that "the lack of evidence on the *Batson* issue does not justify ... upsetting the judgment entered in the original cases." *Mitchell v. State of Tennessee*, 1991 WL 1351, * 1 (Tenn.Crim.App. Jan.11, 1991). Consequently, the Majority erroneously, and disingenuously, states that this "finding" is entitled to a presumption of correctness.

A federal court faced with a habeas petition must attempt to protect dual and sometimes competing values. On the one hand, the Court must pay heed to principles of comity and federalism. *See, e.g., Mata*, 449 U.S. at 547, 550; *Ventura v. Meachum*, 957 F.2d 1048, 1054 (2d Cir. 1992). Thus, state courts must be given the opportunity to pass upon state prisoners' constitutional claims, and once state courts have made factual findings, those findings must be given

preclusive effect in federal courts. However, there is another value that must be protected by federal courts faced with a habeas petition. The federal courts are the principal guardians of the rights guaranteed under the United States Constitution. *Chapman v. California*, 386 U.S. 18, 21 (1967); *see also United States v. Bd. of Ed.*, 11 F.3d 668, 676 (7th Cir.1993) (J. Cudahy dissenting) (stating that "the federal courts have a central role in enforcing constitutional guarantees against state and local governments"); Jesse H. Choper, Judicial Review and the National Political Process 60-128 (1980) (stating as the essential role of federal courts the protection of individual liberties). One of the primary methods the federal courts employ to enforce those rights is the writ of habeas corpus, which the Supreme Court has described as "a bulwark against convictions that violate 'fundamental fairness.'" *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977)). Unfortunately, in their rush to overturn the district court's finding that Mitchell's constitutional rights had been violated, the Majority distressingly abdicates its role as the protector of the guarantees embodied in our Constitution.

I would agree with the Majority's decision were it based upon the need to safeguard principles of comity and federalism, or the importance of protecting the integrity of state fact-finding processes. I would understand the Majority's opinion had it determined that the district court's findings of fact were clearly erroneous. But I cannot concur in the cloak and dagger manner in which this Court is depriving Mitchell of his constitutional right to be tried by state procedures free of racial bias.

Both the magistrate and the district court, who

conducted hearings and made findings of historical fact, agreed that Mitchell was able to establish a prima facie case of race discrimination under *Batson*. Additionally, the magistrate indicated that the prosecutor who conducted Mitchell's trial could not articulate a good reason for challenging a prospective African American juror. The district court agreed with the magistrate that the prosecutor did not have a good reason for challenging the African American juror, but disagreed with the magistrate's conclusion that the prosecutor's reasons were race-neutral. The district court noted that the prosecutor at first stated that he challenged the prospective Black juror because there was "something about the way she looked." He later stated that "she did not look like the right one for this case." Eventually, he settled on the juror's age for striking her from the jury pool. The district court concluded that the prosecutor's reasons, on the basis of his testimony, were "not worthy of belief." The court further noted-and the prosecutor admitted-that there were at least seven other jurors-White jurors-who were the same age or older than the Black juror that was struck. The district court remarked that the prosecutor did not ask any individual questions of the Black juror, nor did he identify "any objective criteria upon which to base his conclusion that ... [she] was unable to follow the evidence because of her elderly appearance." In sum, there is one factor that distinguished the Black juror for the rest of the pool: her race.

In light of the fact that the state court did not make any findings, much less findings of historical fact, the district court properly conducted an evidentiary hearing on Mitchell's *Batson* claim. Thus, the Majority's cause and prejudice analysis is inutile. The Majority argues that because the state court "had

before it nothing more than the petitioner's evidence that no Blacks sat on his jury and that the state exercised peremptory challenges to strike blacks from the jury," the court correctly concluded that there was insufficient evidence to support a *Batson* challenge. What the Majority fails to realize is that the correctness vel non of the state court opinion is not the primary issue in this appeal. The issue is whether the state court's determination should be presumed correct. Section 2254(d) states that a judgement of a state court is to be presumed correct only after "a hearing on the merits of a factual issue." If the Court of Criminal Appeals of Tennessee did not believe that it had enough evidence on the Batson issue, it had only to hold a hearing on that issue to assure that Mitchell was convicted through processes that were not tainted by the unconstitutional exercise of institutional racism.

I cannot help but be amazed at the length to which the Majority will travel to deny Mitchell a fair trial. On the one hand, the Majority agrees with the Tennessee Court of Criminal Appeals, which held that the record was inadequately developed to support Mitchell's *Batson* claim. On the other hand, citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992), for the proposition that state courts are the appropriate fora for resoluting factual disputes, the Majority ruled against Mitchell for not giving the state court "a fair and full opportunity to address and resolve the claim on the merits...." The fact is that the state court was given an opportunity to pass upon the merits of Mitchell's claim, and it declined to do so. Because the state court declined to review the merits of Mitchell's claim, the district court felt that it was judicially obligated to protect Mitchell's constitutional rights.

The district court should be commended, not reversed, for its judicial vigilance by performing its duty in conducting a hearing in a search for the truth. *See Rose v. Mitchell*, 443 U.S. 545, 548 (1979) (stating that "a claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question" providing a particularly compelling justification for federal habeas corpus review); *see also* Sheri Lynn Johnson, The Color of Truth: Race and the Assessment of Credibility, 1 Mich. J. Race & L. 261, 325 (1996) (arguing that the Constitution may require federal courts to hold evidentiary hearings when state court fact-finding procedures are not adequate to provide a full and fair hearing).

Because the Majority has stretched to the point of incredulity the requirement that state courts make findings of historical fact, and has thereby abdicated its responsibility as the primary guarantor of constitutional rights, I dissent from this judicial travesty.

# APPENDIX F

## UNITED STATES DISTRICT COURT

## MIDDLE DISTRICT OF TENNESSEE

## COLUMBIA DIVISION

**No. 1-93-0073**

**Judge Higgins**

**JOE CLARK MITCHELL**

**V.**

**JOHN REES, Warden**

**August 9, 1995**

## MEMORANDUM

The Court has before it the petitioner's objections (filed May 23, 1995; Docket Entry No. 66) to the Report and Recommendation (entered May 9, 1995; Docket Entry No. 64) of the Magistrate Judge, as well as his brief (filed June 15, 1995; Docket Entry No. 77) in support of his objections; the respondent's response (filed June 15, 1995; docket Entry No. 76) to the petitioner's objections and the respondent's response (filed July 24, 1995; Docket Entry No. 84) to the petitioner's brief. The Court hereby makes a *de novo* determination of the case upon the record, pursuant to the Federal Rules of Civil Procedure 72(b), 28 U.S.C. §636(b)(1)(B), and Rule 506 of the Local Rules Governing Duties of and Proceedings Before Magistrates.

Pursuant to the Court's order[1] (entered August 5, 1993; Docket Entry No. 14), the Magistrate Judge conducted an evidentiary hearing on the petitioner's *Batson*[2] claim. In his Report and Recommendation the Magistrate Judge concluded that the petitioner had established a prima facie case of purposeful discrimination. However, the Magistrate Judge recommended that the petitioner's petition for writ of habeas corpus be denied because the petitioner failed to present proof that the respondent's neutral explanation for the striking of the black juror from the jury panel is a pretext for racial discrimination.

The petitioner objects to the Magistrate Judge's finding that the respondent submitted a racially neutral explanation for striking the juror. Petitioner's objections at 8. In addition, the petitioner objects to the Magistrate Judge's finding that the respondent's proffered reason is not pretextual. *Id.* at 1. In his response to the petitioner's objections, the respondent reiterates his contention that his proffered explanation for striking the black juror is racially neutral and therefore rebuts the petitioner's prima facie showing of discrimination. Respondent's response (docket Entry No. 76) at 3-4. In addition, although not specifically characterized as an objection to the Report and Recommendation, the respondent contends that the factual basis for the Magistrate Judge's finding that the petitioner had established a prima facie case is insufficient. *Id.* at 2.

After independently reviewing the Magistrate

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[1] The Court also dismissed all of the petitioner's other claims for the reasons set forth in the memorandum which was entered contemporaneously with this order. *See* memorandum (entered August 5, 1993; Docket Entry No. 13).

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Judge's findings, the petitioner's objections, the respondent's objection, and the entire record, the Court finds the Magistrate Judge's findings and conclusions with regard to the petitioner's fulfilling his burden of establishing a prima facie case of purposeful discrimination are correct and, therefore, the Court shall adopt and approve them. The respondent's objection is without merit and shall be overruled.

However, for the reasons set forth below, the Court shall reject the Magistrate Judge's conclusion that the petitioner failed to prove that the respondent's articulated neutral explanation for striking the juror is pretextual. The petitioner's objection with regard to this issue shall be sustained.[3]

Accordingly, Mr. Mitchell's petition (filed April 22, 1993; Docket Entry No. 1) for writ of habeas corpus on the basis of discriminatory striking of jurors shall be granted.

I.

Pursuant to 28 U.S.C. § 2254, the petitioner, Joe Clark Mitchell, seeks a writ of habeas corpus to vacate his state convictions of aggravated assault, armed robbery, aggravated kidnapping, arson, first degree burglary, aggravated rape, and simple rape.[4] Mr. Mitchell is currently an inmate of the Tennessee Department of Correction (TDOC), confined at the South Central Correctional Facility in Clifton, Tennessee, and alleges that the respondent improperly

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[3] Because the respondent's articulated explanation is facially valid, his reason is deemed racially neutral. *See Hernandez v. New York*, 500 U.S. 352, 360 (1991). Thus, the petitioner's objection that the respondent's explanation is not neutral shall be overruled.

[4] The petitioner was convicted on September 25, 1986.

exercised a peremptory challenge on the basis of race, in violation of the Equal Protection Clause of the Constitution. As a result of this constutional violation, he contends that he is entitled to relief.

II.

It is undisputed that a defendant has "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986). A prima facie case of purposeful discrimination may be established by showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93-94. A defendant may establish a prima facie case of purposeful discrimination in selecting the petit jury with evidence of the prosecutor's use of peremptory challenges during his trial. *Id.* at 96.

In order to establish this prima facie case, the defendant must first demonstrate that "he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* (citations omitted). It is well-established that peremptory challenges as a jury selection practice allow discrimination by those who have a proclivity to do so and that a defendant is entitled to rely on this as part of his prima facie proof. *Id.* Finally, the defendant must demonstrate that other relevant circumstances, in addition to these facts, raise an inference that the prosecutor used peremptory challenges to exclude potential jurors because of their race. *Id* at 96.

The Court considers all relevant circumstances in determining whether the defendant has established the requisite elements. *Id.* Once a prima facie showing has been made, the state "must articulate a neutral explanation related to the particular case to be tried."

*Id.* at 98. The prosecutor's explanation of his legitimate reason for exercising the peremptory challenge must be clear and reasonably specific. *Id.* at 98 n.20.

As noted by the Supreme Court of the United States, determination of the race-neutrality of the prosecutor's explanation involves an assessment of the "facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The court must make the ultimate determination of whether the defendant has carried his burden of proving intentional discrimination. *Batson*, 476 U.S. at 98. Thus a peremptory challenge inquiry typically involves the decisive question of "whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S. at 365.

III.

The evidence before the Court indicates that he respondent's explanation for the peremptory challenge of the black juror,[5] Ms. Alderson, is pretextual and the petitioner has carried his burden of proving purposeful discrimination. During the evidentiary hearing, the prosecutor, Mr. Bottoms, testified that he struck Ms. Alderson because of her elderly appearance, as he believed that she would be unable to follow the evidence in the case.[6] Transcript of evidentiary

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[5] The only other black juror was excused by the trial court for cause after Ms. Alderson was peremptorily struck by the respondent.

[6] Mr. Bottoms explained that the state's case consisted of circumstantial evidence. Transcript of evidentiary hearing (filed June 1, 1995; Docket Entry No. 67) at 22.

hearing (filed June 1, 1995; Docket Entry No. 67) at 22. He further testified that the reason he challenged Ms. Alderson was "probably" because she was elderly. *Id.* at 24-25. Because a discriminatory intent is not inherent in this explanation, the respondent's reason is deemed to be racially neutral. *See Hernandez*, 500 U.S. at 360.

However, the evidence before the Court leads to the conclusion that this racially neutral explanation, however characterized, is not worthy of belief. As an initial matter, it is undisputed that Mr. Bottoms failed to strike white jurors who were older than Ms. Alderson. Although the evidence indicates that Mr. Bottoms was unaware of the jurors' specific ages, the Court notes that a number of white jurors who were not challenged by Mr. Bottoms were older than Ms. Alderson, one of whom was eleven years older. *See* transcript at 38-41.

Furthermore, Mr. Bottoms did not identify any objective criteria upon which to base his conclusion that Ms. Alderson was unable to follow the evidence because of her elderly appearance. Specifically, he did not indicate that she looked particularly frail or infirm in any way which might signify a physical condition which would render her less able to follow the course of the trial. Rather, Mr. Bottoms acknowledged that he could not specify what aspect of Ms. Alderson's appearance led him to conclude that she would be unable to follow the evidence. *Id.* at 35-36. Likewise, he admitted that he could not recall anything about her demeanor.[7] *Id.* at 51.

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[7] Unfortunately, Mr. Bottoms was unable to locate his file containing his trial notes on his reasons for striking Ms. Alderson.

Mr. Bottoms' questions during voir dire examination support an inference of discriminatory purpose. *See Batson*, 476 U.S. at 97. For example, it is significant that Mr. Bottoms asked Ms. Alderson no questions individually, relying solely upon her responses to questions directed to a group of three jurors which included Ms. Alderson. Transcript at 32-34. Mr. Bottoms acknowledged that the only question Ms. Alderson answered differently from the other two jurors was with regard to her experience of serving on many juries.[8] *Id.* at 46, 51. Nonetheless, a white juror in this group, Ms. Stephens, who was slightly over one year younger than Ms. Alderson, was not challenged by Mr. Bottoms.[9] *Id.* at 43.

Furthermore, Mr. Bottoms failed to ask Ms. Alderson any questions concerning her health, physical condition, mental state or general ability to follow the court proceedings. Although Mr. Bottoms did not know Ms. Alderson's age and claimed to have concerns due to her elderly appearance, he failed to ask her any questions to elicit her age or other information relevant to his concerns. He did not ask any questions to determine whether her age, physical condition or health would have an impact on her ability to serve as a juror.

Moreover, the conclusion that the respondent's proffered neutral explanation is pretextual is further supported by Mr. Bottoms' reliance on general assertions and his failure to recall precisely why he concluded Ms. Alderson would be unable to follow the

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[8] The Court notes that Ms. Alderson's extensive previous jury service might be considered to be a variable which would enhance her ability to understand and follow court proceedings.

[9] Although not challenged by the state, Ms. Stephens was apparently struck by the defendant.

evidence. It is curious that Mr. Bottoms' trial notes documenting his reasons for striking Ms. Alderson are nowhere to be found,[10] although other parts of the trial file were located. In addition, Mr. Bottoms testified that two other prosecutors tried the case and participated in the voir dire and that all three prosecutors agreed on the peremptory strikes. *Id.* at 21. Despite this fact, the respondent failed to call the other two prosecutors with whom Mr. Bottoms consulted the trial in an effort to overcome the absence of documentation and Mr. Bottoms' failure to recall.

Finally, Mr. Bottoms' testimony that he knew he had a good reason for striking Ms. Alderson or he would have done so because he does not challenge jurors for race is clearly insufficient. As noticed by the Supreme Court, a prosecutor may not rebut the defendant's case "merely by denying that he had a discriminatory motive of 'affirming [his] good faith in making individual selections.'" *Batson*, 476 U.S. at 98 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

IV.

After independently reviewing the Report and Recommendation and the entire record, the Court finds that the Magistrate Judge was correct that the petitioner established a prima facie case of the respondent's purposeful discrimination in striking the black juror in his trial. However, the Court finds that the Magistrate Judge was not correct in concluding that the petitioner failed to prove that the

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[10] The Court finds it passing strange that Mr. Bottoms' notes concerning Ms. Alderson were not turned over to the attorney general's office along with the rest of his documentation of this trial.

respondent's proffered racially neutral explanation for striking the black juror was pretextual.

Accordingly, the Court shall approve and adopt the Report and Recommendation in part and reject it in part. The respondent's objection (Docket Entry No. 76) to the Report and Recommendation shall be overruled. The petitioner's objections (Docket Entry No. 66) to the Report and Recommendation shall be sustained in part and overruled in part.

The petitioner's petition (Docket Entry No. 1) for writ of habeas corpus shall be granted.

An appropriate order shall be entered.

Thomas A. Higgins
United States District Judge

## APPENDIX G

## UNITED STATES COURT OF APPEALS,

## SIXTH CIRCUIT

**No. 06-5693**

***JOE CLARK MITCHELL, Petitioner-Appellee,***

***v.***

***JOHN REES, Warden, Respondent-Appellant.***

**July 17, 2008**

## ORDER

Before: BOGGS, Chief Judge; BATCHELDER and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Further, citations to Abdur'Rahman in the original opinion (on pages 8 and 9) have been deleted.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

## APPENDIX H

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE COLUMBIA DIVISION

**JOE CLARK MITCHELL, Petitioner,**

**v.**

**JOHN REES, Warden, Respondent.**

**No. 1:93-0073**

**April 20, 2006**

## ORDER

JUDGE HAYNES

In accordance with the Memorandum filed herewith, the Petitioner's motion for relief under Fed. R. Civ. P. 60(b)(6) (Docket Entry No. 151) is **GRANTED** and this Court's Final Judgment (Docket Entry No. 144) is **AMENDED** to grant the writ of habeas corpus, subject to the State's retrial of the petitioner within 120 days from the date of entry of this Order.

The Respondent shall have ten (10) days from the date of entry of this Order to file any application for permission to appeal under 28 U.S.C. §2253(c).

This is the Final Order in this action.

It is so **ORDERED**.
Entered this the 20th day of April, 2006.

William J. Haynes, Jr.
United States District Judge

# APPENDIX I

## UNITED STATES DISTRICT COURT
## MIDDLE DISTRICT OF TENNESSEE
## COLUMBIA DIVISION

**No. 1:93-0073**
**Judge Higgins**

***JOE CLARK MITCHELL,***

***v.***

***JOHN REES, WARDEN***

**March 14, 2002**

## ORDER

Pursuant to the opinion (Docket Entry No. 142) and mandate (Docket Entry No. 143) of the United States Court of Appeals for the Sixth Circuit this action is dismissed with prejudice.

The entry of this order constitutes the final judgment in this action.

It is so ORDERED.

Thomas A. Higgins
United States District Judge

## APPENDIX J

## UNITED STATES DISTRICT COURT
## MIDDLE DISTRICT OF TENNESSEE
## COLUMBIA DIVISION

**No. 1-93-0073**
**Judge Higgins**

**JOE CLARK MITCHELL**

**v.**

**JOHN REES, Warden**

**May 12, 1999**

## ORDER

The Court has before it the Magistrate Judge's Report and Recommendation (entered January 15, 1999; Docket Entry No. 130), the respondent's objections (filed January 29, 1999; Docket Entry No. 131) and petitioner's response (filed March 31, 1999, Docket Entry No. 133).

After independently reviewing the Magistrate Judge's findings, the objections, response and the entire record, the Court finds the Magistrate Judge's findings and conclusions are correct and are adopted and approved. The respondent's objections raise no

new matter not previously submitted and considered by the Magistrate Judge. The objections are overruled. The findings and conclusions of the Magistrate Judge are made the opinion of the Court.

Accordingly, the petitioner's motion (filed July 27, 1998; Docket Entry No. 114) for summary judgment is granted.

The writ of habeas corpus is granted and the respondent-warden, or his successor, is directed to release the petitioner, Joe Clark Mitchell, from custody under his September 25, 1986, conviction in the Circuit Court of Maury County, Tennessee, which is hereby vacated, unless the State of Tennessee has begun a retrial of him within ninety (90) days of the date of entry of this order on the docket.

The entry of this order shall constitute the judgment in this action.

It is so ORDERED.

Thomas A. Higgins
United States District Judge

# APPENDIX K

## UNITED STATES DISTRICT COURT
## MIDDLE DISTRICT OF TENNESSEE
## COLUMBIA DIVISION

**No. 1-93-0073**
**Judge Higgins**

**JOE CLARK MITCHELL**

**v.**

**JOHN REES, Warden**

**August 9, 1995**

## ORDER

In accordance with the memorandum contemporaneously entered, the Report and Recommendation of the Magistrate Judge (entered May 9, 1995; Docket Entry No. 64) is approved and adopted in part. The petitioner's objections (filed May 23, 1995; Docket Entry No. 66) are sustained in part and overruled in part. The respondent's objection (filed June 15, 1995; Docket Entry no. 76) is overruled.

Accordingly, the petitioner's petition (filed April 22, 1993; Docket Entry No. 1) for writ of habeas corpus on the basis of a *Batson* violation is granted.

The writ of habeas corpus is hereby granted and the respondent-warden, or his successor, is directed to release the petitioner, Joe Clark Mitchell, from custody under his September 25, 1986, convictions in

the Circuit Court of Maury County, Tennessee, forthwith, unless the State of Tennessee has begun a retrial of him within ninety (90) days of the date of entry of this order on the docket.

Entry of this order shall constitute the judgment in this action.

It is so ORDERED.

Thomas A. Higgins
United States District Judge